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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 58

IN RE GEORGE ANASTAPLO,

Petitioner.

Reply Brief

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INDEX.

TABLE OF AUTHORITIES CITED*

Constitutional Documents

* Various law review and other publications are referred to below in Notes 11, 14, 17, 18, 23, 34, 45, 54, 61, 63 and 67.

CASES

STATUTES

SUGGESTED CORRECTIONS OF THE CERTIFIED RECORD.

(1) The record at R. 151 should be corrected to show petitioner saying (in conformity with his evident intention as well as with R. 216),

> . . . even with respect to this committee, I would say there may be instances when an applicant should say, " It would be more harmful to the Illinois Bar if I did resist the committee by standing on principle than if I did not resist them. Therefore, I will waive my privileges." That is the sort of decision that one has to make throughout life.

(2) The record at R. 535 should be corrected to show Mr. Justice Bristow saying (in conformity with his dissenting opinion, as printed in 163 N.E. 2d 429, at 444, and in Appendix, Pet. Writ Cert., 64, 53n),

> I also fail to perceive the necessity for the delay of an entire year between the conclusion of the hearings and the decision of the committee.

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Petitioner, George Anastaplo, who seeks correction of the denial of his application for admission to the practice of law in the State of Illinois, respectfully submits this Reply Brief.

I. On the Service of the Petition for a Writ of Certiorari.[1]

The Attorney General of Illinois has closed his Brief for Respondent with remarks about petitioner's service in March 1960 of his Petition for a Writ of Certiorari (Att'y

[1] Petitioner's answer to the Attorney General's arguments on the merits begins at page 12 of this Brief. As in the Brief on the Merits, the footnotes—which are, for the most part, useful elaborations of points made in the text—may be disregarded by the busy reader. See Note 15, this Brief.

Gen'l, 35-36). Since these remarks reflect adversely on petitioner's competence, if not upon his good faith toward an adverse party and toward this Court, petitioner is obliged (even at the risk of seeming to protest too much) to set down a full account of the transaction. He recognizes, that is, the obligation of one in his position to address himself with candor to real "character and fitness" issues, especially when he seeks admission not only to the bar of his State but to that of this Court as well.

The Attorney General complains, in support of his request that the May 2, 1960 grant of certiorari be reconsidered, that he did not have the opportunity to answer the Petition for a Writ of Certiorari (Att'y Gen'l, 35-36),

> . . . for petitioner did not observe the usual practice of serving any copy of his petition or notice of its filing upon the Attorney General although the Attorney General is the only counsel who represents or can represent Illinois in this court.
>
> Petitioner did serve the Chicago Bar Association or its counsel with a copy of his petition. They did not transmit it to the Attorney General, presumably because they could not reasonably suppose that petitioner would not serve the State's only counsel in a case against the State. But the commissioners, like masters and referees, are advisors to the court, not adversary litigants or opposing advocates.
>
> Petitioner must know that it is always the Attorney General, never the Chicago Bar Association, that represents Illinois in this court. *Cf. In re Summers*, 325 U.S. 561, in which it was the Attorney General of Illinois, not counsel for the Chicago Bar Association, who represented Illinois.
>
> The late Grenville Beardsley, Attorney General of Illinois when this petition was filed, and the staff of his appeals division had no intelligence from any source

that this petition had been filed until the day that it was granted and they received this court's telegram to that effect.

> The court needs no protection from groundless petitions for certiorari when the petitions fairly disclose the essence of the case sought to be presented and when respondents have an opportunity to respond to the petitions. The instant petition, however, made no such disclosures, as must now appear, nor did the Attorney General of Illinois have an opportunity to answer it. [Italics omitted].

This passage demands the following corrections and comments.[2]

1. Petitioner, in his dealings with the Illinois bar authorities, has always had difficulty learning just whom to serve: the problem is not as simple of resolution as the Attorney General believes. It is for this reason that petitioner included in a letter of March 4, 1960, to the Clerk of the Supreme Court of Illinois—a letter which was sent also to the Secretary of the Committee on Character and Fitness and to the member of the court below in petitioner's judicial district—, the following request:[3]

> My present plans are to file my Petition for a Writ of Certiorari in the next week or so. I would appreciate learning from you whether the Court has authorized anyone to receive service for it in this matter.

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[2] The Petition itself provides ample refutation of the charge that there was not fair disclosure of "the essence of the case sought to be presented." Therefore, only the charge relating to the service of the Petition is taken up in the pages that follow.

[3] The letters and documents referred to in this part of the Reply Brief are available for inspection by the Attorney General. In addition, petitioner will have them in his possession when he appears for oral argument on December 13. Meanwhile, copies will be made and furnished on request. (Most, if not all, of these papers are already in the files of the Clerk of the court below or of the Attorney General.)

The Clerk replied, in a letter of March 7, 1960,

> As far as this office is informed the Court has not authorized anyone to receive service. It would be my suggestion, however, to make service on Richard H. Cain in this matter.

Mr. Cain is Secretary of the Committee on Character and Fitness.

2. The Attorney General reports that petitioner "did serve the Chicago Bar Association or its counsel *with a copy* of his petition." (Italics added.) This is inaccurate: neither the Chicago Bar Association nor its counsel was served. Rather, acting on the suggestion of the Clerk of the Supreme Court of Illinois, petitioner served on March 16 the Committee on Character and Fitness by mailing a copy of his Petition to the Committee Secretary, Mr. Cain. But petitioner also served separately the Chairman of the Committee, the Chief Justice of the Supreme Court of Illinois and the Clerk of the Supreme Court of Illinois. (Thus, four officials are listed as served in the Proof of Service filed in this Court.) In addition, petitioner provided the Committee Secretary with approximately twenty copies of his Petition for the various members of the Committee and sent copies to other members of the court below as well as to the Chief Justice. Thus, instead of the single copy referred to by the Attorney General, petitioner provided the adverse parties more than two dozen copies of his Petition.

3. It is suggested that *the* copy of the Petition served on the "Chicago Bar Association" was not forwarded to the Attorney General "presumably[4] because they could not

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[4] This use of "presumably" reflects the dubious use of "presumption" throughout the Attorney General's brief. See pages 24-27, this Brief.

reasonably suppose the petitioner would not serve the State's only counsel in a case against the State." What basis is there for this presumption? It is implied that the "Chicago Bar Association" (*i.e.*, the Committee on Character and Fitness) would have forwarded the Petition had it been suspected that petitioner had not served the Attorney General. But it is apparent, both from petitioner's letter accompanying the Petition for a Writ of Certiorari and from his Notice of Docketing (copies of which were sent to the four officials in Illinois), that the committee and the court below were again and again clearly informed whom petitioner had and had *not* served: for petitioner listed, in the documents provided the committee and the court below, all persons to whom these official papers and notices were being sent. There was no need for anyone to "reasonably suppose" anything: at least four Illinois bar admission officials—the Chief Justice and the Clerk of the court below, the Chairman and the Secretary of the committee—were informed, in effect, that the Attorney General had not been served. Thus, an examination of these papers[5] reveals not only that the court below and its committee had been served but also that both the court and the committee were put on notice that no one else had been served.

4. All this follows a familiar pattern. Petitioner had difficulty learning in 1955 whom to serve when he filed in this Court an appeal from the 1954 decision of the court below. It was not until almost two months after his Jurisdictional Statement of January 6, 1955 was filed and served on the same four officials referred to above—and after several inquiries had been made of the Chief Justice

[5] See Note 3, this Brief.

and of the Clerk of the Supreme Court of Illinois—that petitioner was told by the Chief Justice that he might deal with a particular Assistant Attorney General.[6] Even so, it was made clear to petitioner that an authorization had been made at that time and for that purpose: these limitations were set forth in the Assistant Attorney General's letter to petitioner of March 24, 1955:

> In the matter presently pending in the Supreme Court of the United States, No. 532, entitled: *In re George Anastaplo*, the Chief Justice has authorized me to accept service on behalf of the Supreme Court of Illinois. Neither his authorization nor my acceptance should be construed as an admission that the Court or any judge thereof is a party to this litigation.

The emphasis here upon authorization for a limited purpose has disposed petitioner to be cautious: it is partly for this reason that he has made inquiries of the court

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[6] Inquiries were made by petitioner (or, as he was then, appellant) in letters to the Clerk of the court below (December 14, 1954; December 19, 1954; December 29, 1954) and in letters to the Chief Justice of the court below (January 6, 1955; January 7, 1955; February 15, 1955). On February 23, 1955, petitioner was advised by the Chief Justice of the court below, " . . . John Davidson, the Assistant Attorney General at Springfield, Ill., will be glad to cooperate with you in the matter of your appeal to the Supreme Court." The Jurisdictional Statement, to which no response was made by appellee, was filed January 6, 1955. (For these letters, see Note 3, this Brief.)

[7] The Assistant Attorney General's letter was in response to petitioner's inquiry of him, March 22, 1955, "Could you please let me know whether, in the future, I may address all correspondence and serve any further papers with reference to this litigation to you alone? That is to say, should I consider you the attorney for both the Supreme Court of Illinois and the Committee on Character and Fitness?" (See Note 3, this Brief.)

below and that he still serves both the character committee and the court below on all occasions.[8]

5. The Attorney General emphasizes that he "is the only counsel who represents or can represent Illinois in this court"; he describes himself as "the State's only counsel in a case against the State." Yet, it is not "the State" or "Illinois", in the usual executive sense, that is involved here; rather, it is the State of Illinois as it exercises power through the Supreme Court of Illinois. The Attorney General refers to the *Summers* case, "in which it was the Attorney General of Illinois, not counsel for the Chicago Bar Association,[9] who represented Illinois." But even this must be qualified: for it is recorded, at 325 U.S. 562, that

> William C. Wines, Assistant Attorney General of Illinois, with whom George F. Barrett, Attorney General, was on the brief, *for the Justices of the Supreme Court of Illinois, respondents.* [Italics added.]

Even the title of the Attorney General's recent document, "Brief for the State of Illinois, Respondent," incorporates a significant change from the language used in one of the *Summers* case documents, "The Return of the Chief Justice and the Associate Justices of the Supreme Court of Illinois to this Court's Rule to Show Cause . . . ." Strictly speaking, the Illinois Supreme Court seems to think that it,

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[8] The 1955 authorization could not have been regarded by petitioner as still in effect. It must be remembered that this case is not technically the same as the 1955 appeal. Thus, petitioner has been again required to pay docketing fees to the Clerk of this Court. It should be noted, however, that both the Attorney General and petitioner recognize the importance of the earlier case (or, as one might call it, the earlier phase of the decade-long case) for a proper understanding of the present controversy (Att'y Gen'l, 9, 30; this Brief, 12-17).

[9] A further correction is needed here: it was not the character committee sitting in Chicago but another sitting in Decatur before which Mr. Summers had appeared.

rather than "the State of Illinois" (in the usual sense), is the Attorney General's client. And that client was served by petitioner.[10]

It is hardly appropriate for an applicant for admission to the bar either to advise the Supreme Court of Illinois whom it should authorize as counsel or to anticipate the authorization a sharply-divided court might choose to make *at some stage* of the proceedings. Such an applicant treads on delicate ground, as is evident from the fact that he can be criticized even when he has been prudent enough not only to make inquiries but to do far more than he was advised to do by an official presumably in the position to know the current disposition of the court below.

6. The Attorney General does not endeavor to explain why he waited six months, after learning of the grant of the petition on May 2, to raise the objection he now raises.[11] No doubt this Court would have been willing to consider his objection to a grant of certiorari if approached early and with a showing of good cause. Petitioner would not

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[10] There is appended to "The Return of the Chief Justice, etc.," referred to in the text, the following affidavit of November 6, 1944, "William C. Wines, being first duly sworn upon his oath, deposes and says that he is an Assistant Attorney General of the State of Illinois, that *the Justices of the Supreme Court of Illinois, have requested the Attorney General of the State of Illinois to prepare and present the foregoing return and the brief in support thereof,* that this affiant has read the foregoing return, that he knows the contents thereof, that the same are true and that he makes this affidavit by the authority of the Attorney General of the State of Illinois." (Italics added.)

[11] It is unfortunate no one in the Attorney General's appeals division noticed the March 1960 issue of the *Illinois Bar Journal* which had as a headlined story on its prominent "Late Dateline" yellow page (facing the inside front cover), "Anastaplo and Molitor Opinions Appealed to U. S. Supreme Court." Petitioner does not suggest, of course, that an account in a legal journal would suffice to remedy an inadequate service. (See, also, 28 *U. S. Law Week,* 3295, April 5, 1960.)

have objected to a reconsideration, for he is not interested in securing any technical advantage, even if he should be entitled to it. Indeed, petitioner does not object even now to a reconsideration by this Court of its grant of certiorari. But he must object to the manner in which the Attorney General has proceeded to undermine petitioner's reputation and standing with this Court and with the profession at large. Had the Attorney General troubled to make the obvious inquiries of his clients, he would have spared petitioner the effort and expense called for by this portion of his Reply Brief.

7. Lest it be thought that the Attorney General's carelessness and unfairness were provoked by sharp practices on the part of petitioner, as counsel *pro se*, something should be said about petitioner's relations heretofore with his adversaries. It must be noted, first of all, that the character committee and its secretary do not treat petitioner as one whose character and fitness make him suspect as opposing counsel. Thus, for example, the character committee accepted every one of an extensive set of suggested record corrections by petitioner before the case was docketed in the court below.[12] The committee went so far as to entrust petitioner with the responsibility for inserting these corrections in the record submitted to the court below for review of the committee's action.[13] Or, to take

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[12] See, *e.g.*, R. 366, 448-449.

[13] And when, upon receipt of the certified record petitioner carefully checked all the corrections against the various approved lists of corrections and found some corrections not previously submitted to the committee for adoption, he notified the adverse parties, attempted to remedy the matter by stipulation (which was later done), and attached to the certified record a notice which concluded, " . . . petitioner has marked on the record with a red check all such unauthorized corrections. Both the Clerk of the Supreme Court of Illinois and the Committee on Character and Fitness have been informed of this arrangement." (See Note 3, this Brief.) (For examples of petitioner's corrections, see p. iii, this Brief.)

another example, petitioner made arrangements on his own initiative for providing the Attorney General (after he entered his appearance as counsel for respondent) with page proofs of the Brief on the Merits three months before he was obliged to serve that brief on the adverse parties, even anticipating by several weeks the request of the Clerk of this Court that he do so. And when, upon receipt of the printed record, the brief was put in final form and formally served, petitioner voluntarily supplied the Attorney General with a careful list of the few minor deviations from the page proofs petitioner had furnished him months before. Instances of this kind can be multiplied: but these should be sufficient to indicate that petitioner has always tried to play fair with his opponents.

Petitioner's position of the last decade has been sustained, in part, by the misgivings he has about the character and competence of the American bar of our time. It would be self-defeating if petitioner should not himself apply the standards he has advocated for others:[14]

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[14] Concluding passage of a lecture, "Freedom, Justice and the Rule of Law—An Introduction to Due Process of Law," delivered by petitioner at the Hillel Foundation Jewish Student Center, The University of Chicago, January 25, 1959, as one of a series of lectures on "Justice." In a footnote to this passage (in the mimeographed version of January 1960), petitioner suggests, "The institution of due process, as we know it, seems to have as one of its supports the assumption that it is an instrument that can do more good in the hands of men of good will than harm in the hands of bad men. The problem of both deliberate and ignorant misuse of this instrument may best be attacked by raising the quality of the bar. The quality of the bar may be raised partly by the profession being much more selective than at present about who is permitted to enter and to remain in the bar, partly by fundamental changes in the curriculum of the law schools (changes *not* in accordance with the trend to add "social science" material)." (See, on the lawyer's education, the changes implicitly suggested by Notes 23 and 61 of this Brief as well as by Note 56, Brief on the Merits.)

For an instructive account of how responsible and well-trained lawyers exercise the power of a state, see Jowitt, *Some Were Spies* (1954), especially the chapter, "The Royal Mail Case," pp. 164-184; Phillips, *Felix Frankfurter Reminisces* (1960), pp. 48-49 (*cf.* pp. 203-204).

". . . The bar, as well as the conscientious and informed citizen, needs the aid of sober and sobering custom and tradition in its effort to secure justice and the blessings of liberty. Such aid is needed if responsible men are to withstand the waves of passion that can sweep a people. Perhaps truth can win out against error if there is a free and open encounter. Perhaps. But, in political matters, we often cannot wait for reason to have its effect; we often cannot afford to let matters ride until passion is dissipated or until old truths are rediscovered. We have to make use of and defend as if unassailable the partial truths inherent in our time-tested institutions.

". . . But, in the final analysis, rules of law, if they are to be useful, must be applied by men who have not only a respect for rules but also self-respect. . . . Just as no rules can be drawn to cover all situations, neither can a system of law be entirely policed by courts of appeal. Much has to be left to the decency, fidelity and courage of the men, in all the branches of government, national and local, who make daily the bulk of decisions affecting the lives and fortunes of their fellow citizens. We must never forget that the principal classical writers set before us as a standard of the best possible government one in which the truly wise man ruled. Thus, the rule of law, with its inability to anticipate all circumstances and with its necessary reliance upon men who are far from the wisest, is itself an inevitable compromise with the best. It is a compromise that can best preserve for us—a people of our tradition, temper and institutions—a decent community when good men become lawyers or lawyers good men.

"I have stressed the role of self-respect. We must be, as Elihu Root, an eminent American lawyer of another generation, once counselled, fully conscious of 'the moral quality of honor that underlies all Anglo-American jurisprudence.' Perhaps, indeed, it might be concluded that ultimately a civilized rule of law can endure only among a people which cherishes an abiding, yet moderate, respect for honor.'

II. The Attorney General's Argument on the Merits: Comments and Corrections.

Petitioner considers his position to be reinforced by the arguments on the merits made by the Attorney General, once those arguments are viewed in the proper light. In support of this claim he limits himself to a seven point reply.[15]

1. On the relation between the Declaration of Independence and the inquiries into possible political affiliations.

The contribution of the Attorney General must be acknowledged with respect to one vital point. Since he recognizes the unusual scope of the inquiries directed to petitioner (Att'y Gen'l, 9, 30), the Attorney General further recognizes that some justification must be given for such inquiries or, at least, that some explanation must be made of how they came about, particularly when the character and fitness evidence (in the ordinary sense) is so favorable to the applicant for admission to the bar.[16] Faced by this problem, the Attorney General has done what the Illinois bar authorities have heretofore refused to do: he has admitted that the inquiries about affiliations were provoked and (he argues) justified by petitioner's opinions about the right of revolution. (Att'y Gen'l, 9, 30)

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[15] This detailed reply is made necessary by the nature and extent of the Attorney General's misapprehension of the issues, just as the extent and nature of petitioner's hearings resulted from the character committee's misapprehension of its purpose and authority. *Cf.* Att'y Gen'l, 29. See Note 42, this Brief.

[16] The inadequacy (or absence) of such justification or explanation would seem to raise serious objections with respect to both equal protection (unjustified discrimination) and due process (*e.g.*, refusal to abide by the evidence).

Petitioner has always claimed that this "provocation" came during his first hearing before the character committee.[17] The Attorney General, however, points to materials written by petitioner before that first hearing of November 10, 1950, rather than to the testimony of that hearing (where petitioner first "assumed the intransigent stance" he has since maintained).[18] Petitioner is willing to accept the Attorney General's view of the facts and to examine the implications of that view.

Thus, the Attorney General explains the origin and justification for the affiliations inquiries in this manner,[19]

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[17] R. 140-142, 188, 315, 320-331, 332-333, 339-342, 365, 420, 438, 483; Brief on the Merits, 83-84 (also, Note 15). See the quotation in Note 21, this Brief.

A substantial part of the transcript of the record of the 1950-1951 hearings is printed at 12 Lawyers Guild Review 163-176. One is reminded, upon reading that ten-year old transcript, of petitioner's declaration to the character committee in 1958 (R. 363-364), "I have put on record a reasonable, humane and just alternative to what this Committee has been doing. I have, of course, made mistakes during these many hours of interrogation and conflict. But one thing is clear: I have learned through the hours and years: my position has become stronger, and the need and justification for it more and more apparent to those who will but read, pause and reflect . . . I grant you have the power to intimidate young applicants for admission to the bar, but only those applicants who, in the words of the Canons of Ethics, have forgotten or who have never been taught 'that the profession is a branch of the administration of justice and not a mere money-getting trade'." Compare the quotations in Notes 66 and 67, this Brief (incorporating reactions ten years apart).

[18] Att'y Gen'l, 30, 9. This view of the Attorney General's (that petitioner's prior written materials prompted the committee's affiliations questions) is one shared by three students of the case: (1) Brown, Loyalty and Security (1958), 111-112; (2) Note, 50 Northwestern Univ. L. Rev. 94 (1955); (3) Trumbull, "Observations on Recent Illinois Supreme Court Decisions," 42 Chicago Bar Record 57, 60 (November 1960). *Cf.* Note 15, Brief on the Merits.

[19] Att'y Gen'l, 30. The Attorney General does not attempt to justify either the repudiated religion inquiries or those relating to the Democratic and Republican Parties, all of which petitioner refused to answer. R. 22-26, 137-138, 182-184, 185-194, 256; Notes 23, 41, 61, Brief on the Merits.

> If petitioner means to suggest that the Committee on Character and Fitness must ask every applicant questions as to his possible memberships in and affiliations with subversive groups or may ask none of them any such questions, his argument seriously misconceives the Committee's functions and gravely misprises the import of equal protection.
>
> Petitioner had admittedly written some prose that could not possibly disqualify him *ipso facto* from any right or privilege to which he was otherwise entitled but that did awaken *a most natural inquiry* as to what he meant by it. [Italics added.]
>
> He *thereupon* assumed the intransigent stance that he has maintained *for nearly ten years*[20] and has refused to answer perfectly proper questions for that period of time. [Italics added.]

Earlier, he says (Att'y Gen'l 9),

> Petitioner's published utterances on the right of revolution did not and could not constitutionally disqualify him from the practice of law. But they were of such tenor as permissibly prompt questions that are not invariably or even usually addressed to other candidates.

The only prose petitioner wrote ten years ago which was brought to the attention of the character committee at the time he first "assumed [his] intransigent stance"—certainly the only such prose that could conceivably be considered "published utterances on the right of revolution"—, is to be found in his questionnaire of October 26, 1950. It is, in short, the essay he wrote in response to the committee question, "State what you consider to be the

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[20] This "intransigent stance" was first assumed during petitioner's initial appearance before the character committee, November 10, 1950. The Attorney General's brief was filed November 4, 1960 (*i.e.*, "nearly ten years" later).

principles underlying the Constitution of the United States." Petitioner's essay reads,[21]

> One principle consists of the doctrine of the separation of powers; thus, among the Executive, Legislative, and Judiciary are distributed various functions and powers in a manner designed to provide for a balance of power, thereby intending to prevent totally unrestrained action by any one branch of government. Another basic principle (and the most important) is that such government is constituted so as to secure certain inalienable rights, those rights to Life, Liberty and the Pursuit of Happiness (and elements of these rights are explicitly set forth in such parts of the Constitution as the Bill of Rights). And, of course, *whenever* the particular *government* in power *becomes destructive of these ends, it is the right of the people to alter or to abolish it* and thereupon to establish *a new government*. This is how I view the Constitution. [Italics added.]

The critical language relating to the right of revolution, according to the Attorney General's rationale, must be the sentence which includes the italicized words: it is this

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[21] The essay is found at page 9 of the record certified to this Court in 1955. This is the passage referred to by the "three students of the case" cited in Note 18, this Brief. The passage is virtually the same as its counterpart in petitioner's current questionnaire (R. 381-382). The October 26, 1950 questionnaire was the only item (in the record) which had been written by petitioner when he first appeared before the character committee, November 10, 1950. The only other items in the record were the character references and affidavits, required by committee rules, submitted by a dozen lawyers and citizens. Of this original record one of the commissioners said *at the conclusion* of the appearance where petitioner first assumed his "intransigent stance", "Your record, which I have just skimmed through, indicates that your teachers had the greatest regard for your Americanism and moral principles, and I am also aware of the fact that you have served in the Air Force and that you . . . were a part of the armed forces fighting for a cause." (Record certified to this Court, 1955, p. 17.) (See Notes 23 and 64, this Brief.)

utterance which, although not disqualifying or "seditious", is "of such tenor as permissibly prompt[s] questions that are not invariably or even usually addressed to other candidates." (Att'y Gen'l, 9, 30n)

Petitioner has often maintained that he has been given special treatment by the character committee primarily because of his defense of the *principles* of the Declaration of Independence.[22] Now the Attorney General, speaking on behalf of the Illinois bar authorities, confirms this claim in ample measure. For the Attorney General attempts to justify the committee's affiliations inquiries as called for by language the tenor of which no American should be obliged to defend or even explain: *for petitioner had providentially drawn the fatal (italicized) language, word for word, from the Declaration of Independence.*

The principal merit of the Attorney General's brief lies in the fact that it concedes what petitioner has for ten years hoped someone would admit. It is appropriate to restate here the argument petitioner advances at pages 83-84 of his Brief on the Merits (omitting footnotes):

> Petitioner has been penalized, throughout his association with the Illinois bar, for the expression of his views on the Declaration of Independence and the right of revolution. It was only because committee members took offense at petitioner's views on this subject (which were elaborated in response to questions) that he was asked about his affiliations in the first place. Continuing resentment toward his perfectly proper views on rightful rebellion is to be seen throughout the present record and crops out several times both in the committee majority report and in the *per curiam* opinion of the court below. But if anything is protected by the First and Fourteenth Amendments against attack by the States, surely it

[22] See the citations of the record, Note 17, this Brief.

must be the expression of that fundamental American political opinion, a belief in the Declaration of Independence and the right of revolution.[23]

2. On what petitioner, the Attorney General and the character committee "should have known."

The argument advanced by the Attorney General which is probably intended as his principal one is set forth at page 10 of his brief,

> Petitioner should have known at the time of his first appearance before Illinois' Committee on Character and Fitness, was explicitly told by a unanimous Supreme Court of Illinois on September 23, 1954, and was again informed by that still unanimous court on September 17, 1957, that he would not be eligible under Illinois' law for admission to the State's bar until he answered questions concerning his possible membership in or contacts with subversive or other criminal organizations.

Taken literally, this statement suggests that no applicant is admitted to the Illinois bar until he *has* answered such questions. But, as the Attorney General concedes elsewhere (Att'y Gen'l, 8-9, 30), few if any other applicants are subjected to the inquiries to which petitioner has been subjected. Presumably, few members of the bar have been shown to be eligible—unless, of course, there is substance to the Declaration of Independence foundation that the Attorney General points to as justification for an insistence upon something special of petitioner. (See pages 12-16, this brief.) But we must go on to the evidence adduced for the claim of that which petitioner "should have known"

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[23] "We have room for but one loyalty, loyalty to the United States. We have room for but one language, the language of the Declaration of Independence and the Gettysburg speech." Charnwood, *Theodore Roosevelt* (1923), xix. See Abraham Lincoln's Springfield speech of June 26, 1857 (*Complete Works*, Nicolay-Hay edition, 1902, I, 232) (also, R. 495). *Cf. Brown* v. *Board of Education*, 347 U.S. 483, particularly Note 11.

at various stages of his dealings with the character committee, evidence which is seen in the "notice" said to have been given by three court opinions.[24]

(a) "The first unmistakably plain utterance of Illinois' relevant requirements became accessible" when this Court decided *In re Summers*, 325 U.S. 561 (Att'y Gen'l, 12). But that case says nothing at all about the principal problem presented by the present case, the effect to be given to a conscientious refusal, on constitutional and other grounds, to answer questions about political affiliations ("subversive" or otherwise). In the *Summers* case, the applicant answered all questions put to him. Mr. Summers (a conscientious objector) was denied admission because he could not say he would take up arms in time of war to defend the constitutions of the state and nation. This reservation was thought to make it impossible for him to support the Illinois Constitution in its entirety.[25] The case against petitioner, on the other hand, does not arise from his refusal to abide by any provision of the Illinois Constitution; rather, it can be traced back to his defense of principles incorporated in the Illinois constitutional provisions which protect freedom of speech and due process of law, which reaffirm inalienable rights, and which prohibit test oaths.[26]

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[24] This "should-have-known" contention is a belated attempt to qualify the Illinois bar authorities for the exception left open in the *Konigsberg* opinion, 353 U.S. 252, at 261. Nothing is said by the Attorney General of the much clearer "notice", supporting petitioner's position, given by a unanimous court in *In re Holland*, 377 Ill. 346, 36 N.E. 2d 543 (cited in *Konigsberg*, 353 U.S. at 270) (see Note 64, this Brief).

[25] Reference was made to the militia provisions. Illinois Constitution, Art. XII, Sections 1, 6.

[26] Illinois Constitution, Art II, Sections 1, 2, 4; Art. V, Sec. 25 (R. 53).

It should be recognized, furthermore, that the *Summers* case is of limited validity today, whatever it once stood for. The Attorney General, at pages 13 and 32, quotes from the most important passage in the opinion of this Court in that case, stressing the decisive argument that "a like interpretation of a similar oath as to the Federal Constitution bars an alien from national[27] citizenship." This passage and its decisive argument are buttressed in the same paragraph of the *Summers* opinion by several citations to the *Schwimmer* (279 U.S. 644) and *Macintosh* (283 U.S. 605) cases and by a quotation from the *Macintosh* opinion. (325 U.S., at 572-573) But the Attorney General neglects to mention that those cases have since been overruled by *Girouard* v. *United States* (328 U.S. 61): the repudiation of *Schwimmer* and *Macintosh* in 1946 certainly leaves the 1945 *Summers* doctrine in doubt, to say the least.[28]

(b) "The next definitive statement" putting petitioner on notice is found, it is said, in the unanimous 1954 decision by the court below, *In re Anastaplo*, 3 Ill. 2d 471 (Att'y Gen'l, 13-14). Once again, no attempt is made by the Attorney General to assess the effect of intervening decisions by this Court.[29] Indeed, that 1954 opinion was

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[27] The modifier, "national", is omitted the second time the passage is quoted by the Attorney General.

[28] For an instructive parallel, see the careless use made by a commissioner before the character committee of the repudiated *Rockafellow* case, 17 Ill. 541, to justify religious inquiries. R. 188-189, 206, 259-276.

[29] *Konigsberg* v. *State Bar*, 353 U.S. 252; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232. The Attorney General does not seem to appreciate that his admission of the reason why petitioner was first asked about affiliations (Att'y Gen'l, 9, 30) repudiates the description of the sequence of inquiries on which the rationale of the 1954 opinion depended. (3 Ill. 2d at 474). R. 199-201, 203-204, 260, 325-33. See Note 28, Brief on the Merits.

unanimous, but the court below is in 1960 far from unanimous as to what that opinion stands for. Thus, Mr. Justice Schaefer and Mr. Justice Davis, in their dissenting opinion in the present case, make the following assessment of that earlier opinion,

> Our prior decision determined that questions concerning the applicant's membership in the Communist Party or in subversive organizations were relevant, and we must now determine the consequence to be attached to his refusal to answer them.[30]

It should not be said that an applicant who accepted such an assessment as this of the meaning of the 1954 opinion is given the "notice" or "warning" the Attorney General finds. Even the character committee was not aware of this "notice": for again and again it refused to say that a refusal to answer affiliations questions would in itself be conclusive. The most the committee chairman could say was,[31]

> Now you have asked for a warning when we put a question to you that we think is a pivotal, important question in connection with your qualification. I must tell you that we consider that question, "Are you a

[30] Appendix, Pet. Writ. Cert., 79. The committee chairman made a similar assessment, "We have the ruling of the Supreme Court of Illinois that it was a proper question." (R. 136) But consider Mr. Justice Bristow's insistence that a bar admission committee is "charged only with ascertaining applicant's moral character, and in no way authorized by statute or rule of court to investigate or reject members of any political persuasion from the profession." (Appendix, Pet. Writ. Cert., 67)

[31] R. 102-103. See, for other instances of the same, R. 4, 30, 31, 34, 135, 237, 245, 294-295, 296-297; Note 59, Brief on the Merits. (See, also, Note 32, this Brief.) The committee chairman properly stated the committee's responsibility when he said, "We have an ultimate question before us, whether you have a fit character to entitle you to be admitted to the bar." (R. 281)

> member of the Communist Party," such a question; and that the refusal to answer it may have serious consequences to your application. I am not prejudging you in this regard; and I haven't the slightest idea how any other member of the committee is going to vote on this proposition. I have not, for that matter, made my own mind up as to how I am going to vote. But I can see that it would well be an important question in dealing with your qualification. . . .

The Attorney General does not appreciate the reservations that are seen in this passage and elsewhere in the record: rather, he seems to say that *both* the committee and petitioner "should have known." [32]

(c) The most puzzling piece of evidence the Attorney General advances in support of his "should-have-known" principle is found in the contention (Att'y Gen'l, 15),

> It was again made plain to petitioner on September 17, 1957, by a still unanimous Supreme Court of Illinois that so far as Illinois law was concerned, he was ineligible for admission to that state's bar until he answered questions concerning such associations.

The Attorney General then reproduces in its entirety the Order of September 17, 1957, an order which petitioner had

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[32] It should not be inferred from the Attorney General's insistence upon the advisory role of the character committee that no definite or clear-cut notice or warning could have been given by the committee. (Att'y Gen'l, 16) The committee could well have said to petitioner (if so minded) that his refusals to answer would definitely compel it to make a recommendation against admission. The nearest any member of the character committee came to giving a clear-cut warning came when petitioner refused to answer questions about religious beliefs. (R. 193-194)

The absence of a warning (based on statute, rule or practice) implies that refusals to answer questions will be evaluated in the context of the particular hearing. Thus, automatic disqualification (on a technical finding of "obstruction") seems to be ruled out.

secured when the character committee had refused to reconsider his application after the *Schware* and *Konigsberg* decisions (R. 484). Petitioner has pointed out on several occasions that this Order does not require the character committee to ask about petitioner's possible political affiliations or associations.[33] Indeed, in its context, the Order must be understood as a tactful indication by the court below to its committee that such inquiries need not—perhaps, even, should not—be made. The failure of the court below to mention the much-discussed inquiries into affiliations cannot be dismissed as a mere oversight.[34] Yet the Attorney General now suggests that the character committee was not only permitted but even required by the 1957 Order to insist upon the affiliations inquiries. He does not try to explain why the hearings continued as long as they did after petitioner had served notice upon both the court below and its character committee that he would not answer supposedly essential questions (R. 484-490). Thus, the Attorney General disregards here the context of the Order in the record and the sequence of events.

Petitioner does not deny that he would continue to refuse to answer affiliations questions even if "plainly informed by Illinois' Supreme Court that he would be ineligible for admission to the bar of Illinois until he answered questions of the sort involved in this case" (Att'y Gen'l, 2-3). But he does deny that he or any other applicant *has* been "plainly informed"—and he calls upon the Attorney General to cite a single rule, statute, opinion or even practice of the court below or of its committee which provides that

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[33] R. 61-62, 70, 88-89, 91-92, 119, 160, 195-196, 297 (see, also, R. 500-502); Brief on the Merits, Notes 5, 52.

It should also be noted that both the 1957 Order and the 1954 Opinion of the court below, as interpreted by the Attorney General, are *ex post facto* with respect to an applicant who started law school in 1948 and first applied for admission to the bar in 1950.

[34] Strauss, Persecution and the Art of Writing (1952), 24-26.

an applicant for admission to the bar must answer all questions put to him by a committee on character and fitness.[35]

Petitioner reaffirms his claim that a refusal to answer certain kinds of questions must be evaluated in the light of the reasons given by the applicant, of the record made in the case, of the foundation laid for the questions, and of the purposes of the character committee. Nowhere does the Attorney General assess or even mention the concessions made by the committee and adopted by the court below:[36]

> [The character committee:] . . . no one has stated to this committee that you are or have ever been a communist, or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the

[35] The retreat of the committee from the religious questions, after several weeks of resistance by petitioner, is instructive about the practice, as is the failure of the committee even to mention the unanswered questions about the Republican and Democratic Parties. (See Note 19, this Brief.)

[36] R. 234; Appendix, Pet. Writ. Cert., 39. An observer from another time or place might wonder what conflict remains after these concessions. He might even wonder whether the differences here can be dismissed as only "semantical". (See, *e.g.*, R. 81-85.) But to see all this as merely a question of "semantics" would only reveal a lack of appreciation for the tenor of the times and for the issues underlying this confrontation between a citizen and his state. Consider, for instance, Daniel Webster's approach to just such depreciations of fundamental issues: "[The fathers of the American Revolution] poured out their treasures and their blood like water, in a contest against an assertion [by the Parliament of Great Britain] which those less sagacious and not so well schooled in the principles of civil liberty would have regarded as barren phraseology, or mere parade of words. They saw in the claim of the British Parliament a seminal principle of mischief, the germ of unjust power; they detected it, dragged it forth from underneath its plausible disguises, struck at it . . . " (R. 436-437, 147-148, 149-150)

organizations, or any one of the organizations listed as subversive by the Attorney General's list.

[The court below:] The committee says that it has not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation, and that it has received no information from any outside source which would cast any doubt on Anastaplo's loyalty or which would tend to connect him in any manner with any subversive group.

This case with its long record must be seen as a whole, not as something that can be disposed of with an empty phrase. Or, as the court below observed in a disbarment case cited by the Attorney General on another point (Att'y Gen'l, 17n), "Barren technicalities should not be allowed to submerge the truth in proceedings of this character."[37]

3. On the Attorney General's "presumption" theory.

The Attorney General attempts to improve further upon the rationale of the Illinois bar authorities with a novel use of the concept of "presumption." We presume to suggest that every time this concept is employed in his brief, it represents an attempt to beg the question.[38]

The Attorney General's "presumption" illustrations may be reduced to two sets of cases.

(a) We are told about the requirement of an applicant for a ballot to establish certain qualifications, about the requirement of an applicant for a marriage license to make

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[37] *In re Heirich*, 10 Ill. 2d 357, at 367. When viewed in the proper light, this case, too, supports petitioner's application. See Note 34, this Brief.

[38] We further presume to suggest that the Attorney General would much prefer to say that there is an inference of bad character raised because of petitioner's reliance upon constitutional rights. But the *Konigsberg* case (353 U.S., at 270) is too clearly against *that* phrasing.

certain declarations, and about the requirement of certain elements of proof before a will may be admitted to probate (Att'y Gen'l, 7, 28, 29). But in each of these situations, the reference is to requirements specifically elaborated by statute.[39] Such would have been the case here if there had been a statute or rule requiring applicants for or members of the bar to certify that they did not belong to particular organizations.[40] Instead, the only relevant statutory requirement affecting an applicant for admission to the bar, in addition to the oath which petitioner has always been willing to subscribe, is that he establish his character and fitness, not that he deny membership in any particular organization.[41]

(b) The Attorney General's second set of illustrations deals with damage suits relating to libel and automobile

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[39] Ballot: Ill. Rev. Stat. 1957, Ch. 46, Sections 4-2, 4-8, 5-1, 5-2, 5-7, 5-9. Marriage: Ill. Rev. Stat. 1959, Ch. 89, Sec. 6; Ch. 38, Sec. 75. Probate: Ill. Rev. Stat. 1959, Ch. 3, Sections 194-43, 221-69, 224-72, 226-74. To make each of the situations described by the Attorney General comparable to that of petitioner's, the clerk or registration officer should, without any change in the relevant statutes, attempt to exact statements denying membership in various political parties (on the theory, for example, that Communists do not "believe in" marriage and therefore should not be able to secure a license for that purpose).

[40] The Attorney General sets forth in his brief just such a statutory requirement affecting state employees. (Att'y Gen'l, 24) The absence of such a requirement for lawyers is significant. See pages 30-31, 38, this Brief. Public employees, on the other hand, are not required to establish their "character and moral fitness" (a requirement which would usually be regarded as much more difficult to comply with than the signing of an affidavit).

[41] If there had been a statutory requirement that membership be denied by oath, petitioner would have had to consider challenging it as unconstitutional. (See Note 52, this Brief.) If the Attorney General is correct in his suggestion that this requirement is implicit in the language, "character and fitness," then there are raised here far-reaching issues relating to freedom of speech.

accidents (Att'y Gen'l, 26-28). In each of the situations described by the Attorney General, the refusal of the plaintiff to answer interrogatories relates to one of the principal, if not *the* principal, point at issue. Whatever the effect of the refusal in these situations—and on this we must reserve judgment pending further research [42]—, the problem in petitioner's case is radically different: whether an applicant is a member of the Communist Party or of the Ku Klux Klan would not ordinarily be an issue in a bar admission proceeding even if the character committee does not concede that it has absolutely no evidence connecting the applicant with either of these organizations.[43] The only issue is whether the applicant is morally fit for the practice of law.

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[42] One difficulty faced here by petitioner is that the Attorney General's examples are not supported by citations to the law he relies upon. Petitioner finds that even some of the more plausible examples turn out to be questionable when subjected to close analysis.

Consider, for instance, the assumption that one who believes the earth is flat should not be permitted a license as an aeronautical navigator. (Att'y Gen'l, 31-32) A competent World War II navigator, however, did not have to decide whether the earth was spherical or flat: in fact, the navigator invariably employed "flat" charts for his operations and mapped his course from departure to destination as if the earth were flat. (Even the desirability of following great circle routes on very long flights raised no practical problem for the flat-earth man willing to obey the instructions of his superiors. Petitioner does not suggest, it should be stressed, that the compiler of the astronomical tables and of the charts a navigator must use may also proceed as if *he* thought the earth were flat. He speaks only of that about which he knows from his own experience. R. 380.)

In short, one must beware of the "obvious" when legislating qualifications and disqualifications. (Consider the bar applicant who believes either in the Kingdom of God or in the Kingdom of the Proletariat. R. 105-107, 427.)

Petitioner does believe the earth is pretty much a sphere, however.

[43] *Cf. Kimm* v. *Rosenberg*, 363 U.S. 405, which is said to rest on the application of a statutory provision that Communist Party membership is an "absolute disqualification" for resident aliens.

Neither of the sets of cases with which the Attorney General illustrates his "presumption" theory supports the suggestion that an applicant for admission is "required", in the ordinary [44] bar admission proceeding, to reveal his political affiliations ("subversive" or otherwise). The rules, statutes and principal issue that bear upon a bar admission proceeding do not require that questions about affiliations be answered or even asked, but (at most) that the refusal to answer whatever questions might happen to be asked must be evaluated with a view to its character and fitness implications. Indeed, it may be appropriate to commend, not condemn petitioner for having refused on principle to answer the kind of questions he has stood against for a decade.

Certainly, we cannot commend an innovation which seems to lead to the curious result that petitioner must be presumed to be, despite the unprecedented concessions of the character committee, a member of both the Communist Party and the Ku Klux Klan.[45]

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[44] Of course, the Attorney General does suggest that petitioner's adoption of the language of the Declaration of Independence takes his case out of the ordinary. This suggestion is examined at pages 12-17 of this Brief.

[45] If the Attorney General wants to propose a new presumption, he would be well advised to develop for bar admission proceedings an adaptation of the presumption of innocence. (See petitioner's suggestion, R. 423-425, anticipating that of Mr. Justice Traynor of the Supreme Court of California in the second *Konigsberg* case, 344 P. 2d at 783.)

At the least, the Attorney General might advocate that one who has served his country as an Air Force officer should be presumed to be a good citizen until someone ventures to proffer evidence to the contrary. After all, the "grateful citizens of the State of Illinois" did extend to petitioner in 1947 a "Citation for Meritorious Service" for "having served patriotically and faithfully in the Armed Forces of the United States during World War II." (Petitioner's 1953 brief in the court below, p. 110). *Cf.* Shakespeare, *Coriolanus* (see Note 61, this Brief).

4. On the relation between a voir dire and a bar admission proceeding.

A superficially attractive test of the propriety of questions to be put to bar applicants is suggested by the Attorney General: no man should be made a lawyer "who will not answer the very kind of questions that it will be his duty to compel prospective jurors, witnesses and other persons to answer . . . " (Att'y Gen'l, 35) But a moment's reflection should show that this simply will not do. Is there any question (even about the most intimate or sacred matters) that, in some circumstances, might not be asked of prospective jurors, to say nothing of witnesses?

The Attorney General's illustration is not a happy one: petitioner, he reports (Att'y Gen'l, 34),

> knows that if he becomes a lawyer and if his interest in cases involving freedom of conscience should lead him to defend an allegedly subversive person, he would have a duty to ask *every prospective juror in the case* whether the *venireman* had ever been a member of the Communist Party, whether he believed in the overthrow of the government by violence and whether he had any religious scruples[46] that would prevent him from serving as a juror or taking a juror's oath. [Italics his.]

In short, the Attorney General suggests, it would be the duty of defense counsel to expose and, in effect, disqualify precisely those prospective jurors who are most likely to be sympathetic to his "allegedly subversive" client!

The principal recent case dealing with alleged subversion is probably *Dennis* v. *United States*, 341 U.S. 494. Petitioner refers this Court and the Attorney General to the

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[46] Does the Attorney General continue to rely on the discredited *Rockafellow* case? See Note 28, this Brief; R. 266.

voir dire conducted by the trial judge on that occasion.[47] *That* judge certainly does not, on behalf of defense counsel, ask the kinds of questions enumerated by the Attorney General as the duty of defense counsel to ask. He does ask, upon the suggestion *of the Government*, about membership in the Communist Party and the Ku Klux Klan. There is no pattern of questions either about belief in the overthrow of the government or about religious scruples. Did defense counsel and the trial judge fail to do their duty, thereby denying to the defendants "the rudiments of a trial by jury"? (Att'y Gen'l, 34).

It should be noted that the trial judge did ask, at the request of defense counsel, such questions as whether prospective jurors were members of the Liberal Party, the American Legion, the Socialist Party, the Knights of Columbus, Americans for Democratic Action, the Holy Name Society, the National Association of Manufacturers, the Catholic War Veterans or the Republican League.[48] According to the Attorney General, since these questions can be put to prospective jurors, answers to them can be required as well of any applicant for admission to the bar. This cannot be so. Even the character committee recognized *some* limits: after petitioner had resisted religious inquiries for several hours, the committee was compelled

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[47] Trial Transcript, Volume IV, pp. 2667-3195 (March 8-17, 1949). See, also, *United States* v. *Dennis*, 183 F. 2d 201, at 226-227 (n 34, n 35).

[48] *Dennis* Trial Transcript, Volume IV, pp. 2748, 2750, 2751, 2752-3, 2756, 2782-3, 2849, 2955-6, 2982, 3147, 3148. One standard question put to all prospective jurors was, "Do you or does any close relative hold or have they held any office or position in or been a member of any committee of any political party?" Volume IV, pp. 2919, 3075, 3088-9.

to concede that such inquiries had no place in the proceeding.[49]

The *voir dire* analogy advanced by the Attorney General can best be understood as really supporting petitioner's position. For it is clear that the propriety of the questions asked of prospective jurors depends, in part, on the relevance and usefulness of the questions in securing an unprejudiced jury for the impending trial. Similarly, the questions appropriate for bar admission proceedings must be evaluated in the light of the purpose of the proceedings —in the light, that is, of character and fitness considerations.

Similar to this attempt to substitute *voir dire* standards for those appropriate to a character committee hearing is the Attorney General's suggestion (which is reminiscent of the *Summers* rationalization) that Illinois may "refuse to license as a lawyer one who is disqualified by law from holding any lawyer's positions or other public post in the state government" (Att'y Gen'l, 24). The Attorney General argues here from the statutory requirement of a non-Communist oath for all employees of the State of Illinois.[50] It should be a sufficient answer to point out that the lawyer simply is not a public employee and that his statutory oath includes no political tests.[51]

But, it should be also pointed out, it is not accurate to say that petitioner, if admitted to the bar without answer-

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[49] R. 256. But not even the sky is the limit under the Attorney General's theory if a character committee sits in Indiana, where the State Supreme Court held in 1955 that prospective jurors may sometimes be asked about their religious faith and affiliations. *Wasy* v. *State*, 234 Ind. 52, 123 N.E. 2d 462 (citing, at p. 464, cases in other jurisdictions).

[50] Ill. Rev. Stat., 1959, c. 127, par. 166(b). (Att'y Gen'l, 24).

[51] The lawyer's oath is printed at page 8 of the Brief on the Merits.

ing the questions about affiliations, would be "disqualified by law from holding any lawyer's positions or other public post in the state government." He would still be eligible to sign the affidavit demanded by statute. Whatever may be the validity of a concrete non-Communist affidavit for those employed by the state,[52] there are good reasons for keeping out of bar admission proceedings the kind of extensive and unregulated inquiries to which petitioner has been subjected.[53] The issue is not whether petitioner might someday qualify for government employment, but whether he is presently qualified for the practice of law.[54]

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[52] The Attorney General reports correctly that petitioner has not challenged the constitutionality of this statute. That is because petitioner has not seen fit to address himself to a statute which does not bear upon his matter. The statute *is* open to challenge, of course, on the basis of the First and Fourteenth Amendments of the Constitution of the United States as well as Article V, Section 25, of the Illinois Constitution. See, also, *Wieman* v. *Updegraff*, 344 U.S. 183.

[53] This distinction is reflected in the difference between the *Adler-Beilan-Lerner* line of cases (public-employees) and the *Garland-Konigsberg-Schware* line (attorneys). It is a distinction that is developed in the board's brief in *Beilan* (pp. 12-13) and in the brief *amicus curiae* of the State of New York in *Lerner* (pp. 23-24). See, also, R. 441-447, 501-508; Brief on the Merits, Note 45.

Furthermore, the affidavit approach has the advantage of confronting the applicant with a fixed, known oath, one that has presumably been prepared by experts and publicly adopted by competent authority.

Petitioner has observed on several occasions that his decision whether to resist such impositions would depend in part on his assessment of the circumstances and of the contribution he might make to the common good. (*E.g.*, R. 151, 216, 225) See Notes 66 and 67, this Brief.

[54] "So early as the statute 4 Henry IV. c. 18. it was enacted, that attorneys would be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty." Blackstone, *Commentaries*, III, 26.

5. On the Communist Party, the Ku Klux Klan and the horrors that menace civilization.

All kinds of things are said about the nature of the Communist Party and of the Ku Klux Klan.[55] We are told about race hatred, Anti-Semitism, Anti-Catholicism and sedition (which are all somehow associated with petitioner's stand) (Att'y Gen'l, 20-21).[56] But petitioner must still take what he conceives to be a lawyer-like position: that is, it is still his opinion that membership in either the Communist Party or the Ku Klux Klan is not sufficient ground for exclusion from the bar.[57] Nevertheless, it must be admitted, this seems, in the context of this record (which includes the sweeping concessions of the Illinois bar authorities), pretty much of an academic question.

Whatever the proper status of the Communist Party and the Ku Klux Klan, one may still have plausible constitutional and political reasons for resisting questions about these organizations. Whatever authority there may be for asking such questions, a principled refusal to answer them should have no adverse bearing upon one's character and fitness. Both logic and law suffer when lawyers are encouraged to stray from the bar's traditional concerns (Att'y Gen'l, 32):

> One who believes in treason, mass murder, genocide or other horrors that menace civilization is not the

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[55] See Note 42, this Brief.

[56] One is reminded of the committee chairman's observation that he has "trouble with the concept of the scrupulous communist." (R. 182) No doubt, some would say the same about members of the Ku Klux Klan. But judgments of this kind do not take sufficient account of time, chance and geography, to say nothing of individual character. See Note 50, Brief on the Merits.

[57] See Note 15, Brief on the Merits.

> sort of person whom Illinois must admit to her bar even though he has not yet begun to put these beliefs into practice.
>
> If, as we submit, is true, Illinois may exclude petitioner from her bar if he holds arrantly dangerous or treasonable beliefs, she may certainly ask him whether in fact he holds these beliefs; for he and he alone really knows the answer to that question.

Certainly, petitioner has never hesitated to answer that he does not believe in treason, mass murder, genocide or any of the other horrors that might menace civilization.

6. On the use and abuse of the record.

There is not a single citation of or quotation from the transcript of hearings in the Attorney General's brief. This reflects the failure of the Illinois bar authorities to grasp the significance of the record with respect to the only issue before them, the qualifications of petitioner to practice law. There are, however, references to what is supposedly in the transcript, and several of these must be corrected.

(a) The Attorney General refers to a "procession of witnesses" on petitioner's behalf during the hearing (Att'y Gen'l, 29). But, one does not need to go to the transcript but only to the character committee report to learn that,

> During the hearings the Committee repeatedly reminded applicant that he had the right to be represented by counsel and to call witnesses, but he has preferred to rest his case on his own testimony and advocacy. [Appendix, Pet. Writ. Cert., 11].

There *are* in the record the dozen written character affidavits and references required by committee rules (R. 386-414), but in none of these is there any statement about petitioner's political affiliations or lack of affiliations, despite the suggestion of the Attorney General that petitioner tried to meet the burden of proof on this issue through "witnesses" rather than by his own testimony (Att'y Gen'l, 7, 29).

Neither petitioner nor his character references have spoken to the issue of Communist Party and Ku Klux Klan affiliations or introduced any evidence for the purpose of showing affiliations or lack of them.[58] Rather, both petitioner and his references have addressed themselves and have intended to address themselves only to the issue of his character and fitness to practice law. (Petitioner, in addition, has tried to show why the affiliations inquiries should play no part in the consideration of his application.) The Attorney General would have been accurate had he limited himself to the observation that only the character committee has spoken to the issue of memberships, admitting it had absolutely no evidence "which would tend to connect [petitioner] in any manner with any subversive group." (Appendix, Pet. Writ. Cert., 12, 39)

(b) The Attorney General alleges, at page 3 of his brief (in the Summary of Argument), that petitioner did not

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[58] See, *e.g.*, R. 299-301, 439-440; 170-171; 181-182; 291-293. The character committee minority correctly reports, "The actual, limited extent of applicant's refusal to answer [certain questions] should be made clear. Applicant has answered fully all questions, including those concerning his political beliefs, except only such questions as were of such a specific nature and intent as—in the very answering—necessarily to reveal adherence or non-adherence to or membership or non-membership in a particular, identifiable organized political or religious group." Appendix, Pet. Writ. Cert., 30. See, also, Note 39, Brief on the Merits.

"make timely assertion of [the] contention [of denial of equal protection of the laws] in accordance with Illinois principles of practice, which principles are themselves constitutional." But he does not (in the Argument itself) say anything more about this allegation; nor does he try to explain away the timely assertions made by petitioner at pages 485 (nl), 29, 85, 146, 161, 335 and 353 of the Record as well as in the briefs filed in the court below.

(c) The Attorney General claims that petitioner "volunteered *ex gratia*" his views on when it might be proper to resist court decrees and advise others to do so, adding (at page 34) that petitioner

> did not delimit the circumstance that might impel or dispose him to advise violence as a justifiable means of avoiding the effect of the orders of courts of whom [*sic*] he hopes to be officers [*sic*].[59]

But, of course, the record shows petitioner engaging in these discussions only upon the insistence of the committee; it also shows him carefully delimiting the circumstances when resistance to constitutional usurpation (by any branch of the government) would be not only the right but even the duty of the responsible citizen (R. 87-88, 161-164, 165-167, 211-216, 217-220, 347-348).[60]

(d) "Petitioner," we are told, "does not even yet give a sensible reason why he will not answer the questions involved in this case." (Att'y Gen'l, 34) A weary petitioner can only reply that he has tried. He must refer both the

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[59] Petitioner notes in passing the observation, "volunteered *ex gratia*" by the Attorney General, that petitioner's essays are "dull and very poorly written" (Att'y Gen'l, 30n).

[60] Petitioner consented to answer committee questions about his views on the right of revolution, after having had overruled his objections to such inquiry. R. 87-88, 131-132, 145-147, 156-157, 164-167, 207-220, 250-251, 325, 333, 341-342, 348, 421, 431. See Brief on the Merits, Note 18.

Attorney General and this Court to his Closing Argument for a comprehensive statement of his position.[61] It is appropriate here to stress again one of the principal reasons why petitioner has taken the position he has, his concern for the quality and integrity of the bar of his state and country.

7. On due process and the overwhelming proof of good character.

There remains for consideration the negative answer advanced by the Attorney General to the question he sets forth at page 33 of his brief:

> Even though the record may *permit* a finding of petitioner's fitness to practice law, does the evidence so imperiously *compel* such a finding as to render the contrary declaration of a majority of Illinois' Supreme Court a denial of due process? [Italics his.]

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[61] R. 314-365. This Argument and the 1958 majority and minority reports of the character committee are reproduced in Numbers 4 and 2 of Volume 19 of The Lawyers Guild Review. "Sensible reasons" may also be found, among other places, in the opinions of this Court in *Garland* (4 Wall. 333), *Barnette* (319 U.S. 624), and *Konigsberg* (353 U.S. 252). See, also, Note 69, Brief on the Merits; *Syrek* v. *California Unemployment Insurance Appeals Board*, 354 P. 2d 625.

Of course, individual temperament (*i.e.*, nature) plays a part in determining whether "sensible reasons" are acted upon. See, *e.g.*, "The Strange Case of Sir William Fox," 24 New Zealand Law Journal 231 (R. 353-356); R. 232, 360, 365. See, also, Cicero, *De Officiis*, Book I, Cap. xxxi, xxxii-xxxiii; Note 56, Brief on the Merits (*cf.* Cicero, *Brutus*, Cap. 31, 73; Plato, *Republic*, 496D-497A); Shakespeare, *Coriolanus*, II, i, 186-187, 221; ii, 140-153; iii, 262-271; III, i, 38-41, 81, 254-261; ii, 39-45, 110-123; iii, 119-134; V, iii, 182-185. Petitioner closed his 1959 brief in the court below with the observation, "I hope this Court can see its way clear to uphold publicly those old-fashioned American principles that it has been my duty, pleasure and good fortune to support and defend."

See, finally, Aeschylus, *Prometheus Bound*, 380-387.

Petitioner submits that a due respect for the rule of law and for the rules of logic requires an affirmative answer to this question.

This is a proceeding in which the bar committee is required by law to pass on an applicant's character and fitness. Thus, Rule 58, Rules of Practice and Procedures of the Supreme Court of Illinois, provides,

> If the Committee is of the opinion that the applicant is of approved character and moral fitness, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar.

Compare the Attorney General's offhand amendment of this Rule, at page 5 of his brief,

> No amount of proof, however overwhelming, of petitioner's good character will suffice as a substitute for petitioner's personal and direct answers to these questions [as to his possible membership in or affiliation with subversive organizations].[62]

It is generally acknowledged that the court below has extensive powers over admission to the bar. But that court publicly advised bar applicants how it proposed to exercise those powers when it promulgated Rule 58. This rule contains no reference to the kinds of tests, "presumptions" and "notices" the Attorney General has attempted to read into it. The Illinois bar authorities are obliged to abide by their own rules and procedures, pursuant to which an overwhelming case has been made on behalf of petitioner's character and fitness. *Service* v. *Dulles*, 354 U.S. 363. Certainly, this Court should not be asked to

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[62] This is true, the Attorney General argues (at page 18), even if "the amount of evidence of petitioner's good character" (without direct answers as to affiliations) should be "overwhelming and wholly uncontradicted." (For Rule 58, see Brief on the Merits, 7-8.)

ignore the responsibility it has recognized in the *Summers*, *Konigsberg* and *Schware* cases.[63]

The Attorney General has referred to the non-Communist oath required by statute of state employees in Illinois (Att'y Gen'l, 23-25); a member of the character committee referred to the non-Communist oath required by the Illinois Bar Association of its members (R. 303). One sees here two instances in which the state and the bar *have* changed the rules to make an explicit disavowal of Communist Party membership one of the conditions for "admission." In the absence of similar provisions in the rules and statutes bearing upon bar admissions, the traditional non-political meaning of terms such as "character and moral fitness" governs.[64]

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[63] The reluctance of this Court to review a jury's unanimous judgment upon the evidence is well known. This situation is not comparable. One-third of the character committee voted for petitioner; the other two-thirds did not rely on a different assessment of the evidence but rather advanced technical arguments for ignoring that evidence. Upon the validity of those arguments an appellate tribunal is in at least as good a position as the "trial" tribunal to pass. In fact, the Attorney General himself points out, "The general rule that the findings of a lower tribunal will not be disturbed if they are supported by substantial evidence does not apply to matters affecting the right to practice law." (Att'y Gen'l, 17n (italics omitted)).

Finally the Secretary of the Chicago Bar Association closed an address at the June Annual Meeting of that organization with the observation, "I venture to predict, and I sincerely hope, that our Court will be reversed in the *Anastaplo* case. Justifiable pride in the performance of our Court permits the desire to see it redeemed from occasional error." Trumbull (R. 389-390, 319), "Observations on Recent Illinois Supreme Court Decisions," 42 Chicago Bar Record 57, 62 (November 1960).

[64] See Note 46, Brief on the Merits. Petitioner knows of no action taken in Illinois to disbar lawyers who advocate the constitutional position petitioner has defended. *In re Holland*, 377 Ill. 346, 36 N.E. 2d 543, seems to discourage such disbarment. See, also, *Sheiner* v. *State*, 82 So. 2d 657 (Fla.).

(Footnote continued on page 39)

All these considerations are reinforced by the confession of the Attorney General that the case against petitioner is founded upon a young man's adoption ten years ago of the very language of the Declaration of Independence.[65]

Conclusion

A higher public interest in a responsible and independent bar overrides the purely personal interest of petitioner in a respectable career and of the Illinois bar authorities

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(Footnote 64 continued)

There is not in Illinois any rule or statute prescribing political or "loyalty" tests for admission to the bar of the kind found in some states and described in Brown and Fassett, "Loyalty Tests for Admission to the Bar," 20 Univ. Chicago L. Rev. 480 (1953). Petitioner's matter is discussed at pages 482, 492, 501-502. Note 80 of the article, which seems to employ the term "gratuitous" where "candid" would be more appropriate, suggests arguments which are dealt with at pages 12-17 and in Note 23 of this Brief.)

[65] See pages 12-17, this Reply Brief. It is appropriate to remind ourselves of the statutory oath which attorneys and counsellors of the courts of the United States successfully resisted almost a century ago (*Ex parte Garland*, 4 Wall. 333, at 334-335): "I, A.B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God."

(Footnote continued on page 40)

in formal vindication. For, as it has been said,[66] the issues of this case "involve nothing less than a definition of the desired moral character of the American bar . . . "

If petitioner has contributed anything to the definition of that character, the credit in good measure belongs to his Committee on Character and Fitness and to the Supreme Court of Illinois. He could not have accomplished the little he has done but for the willingness of those tribunals to provide a full day in court to an applicant with

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(Footnote 65 continued)

The much more dignified oath, which the Act of Congress had attempted to replace, read, "I, A. B., do solemnly swear (or affirm, as the case may be) that I will demean myself as an attorney and counsellor of this court, uprightly, and according to law, and that I will support the Constitution of the United States." (4 Wall., at 336). The present Illinois oath for attorneys is printed at page 8 of the Brief on the Merits.

The problem of dignity is much more serious today than is generally recognized. See R. 353-356, 357-362. It is appropriate to repeat here the apology with which petitioner opened his Closing Argument before the character committee (R. 314), "I hope that what I have to say is significant enough to compensate for my inadequacies as an advocate . . . and to compensate as well for the unedifying and inevitably falsifying spectacle of having to talk so much about oneself."

[66] Brief of American Civil Liberties Union, *Amicus Curiae* (Professors Harry Kalven, Jr. and Roscoe T. Steffen, The University of Chicago Law School, Counsel), p. 2. The brief concludes (pp. 25-26), "And we respectfully ask the Court to reverse the judgment below. In so doing, the Court will not only do justice in this case, but it will be vividly reaffirming for generations of applicants to come, the high place that candor, courage, and independence of mind have as attributes of that character and fitness which make the lawyer."

On the constancy of petitioner's position, see Commissioner Rothschild's assessment, "The petition for rehearing contains nothing substantial that was not expressed in the original hearings, 6 or 7 years prior to *Konigsberg* and *Yates*." Appendix, Pet. Writ. Cert., 5n.

remarkably little support among the lawyers and law teachers of his state.[67]

Petitioner is grateful to the court below and its character committee for that which they *have* done. The Illinois bar authorities should, in turn, be grateful if induced by this Court to go even further than they have been able to make themselves go toward the realization of that justice which is the only true foundation of the security for which they seek.

Respectfully submitted,

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6030 Ellis Avenue
Chicago 37, Illinois
DOrchester 3-4825

Carterville, Illinois
November 24, 1960

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[67] Professor Malcolm P. Sharp, of the University of Chicago Law School, observed in a letter of March 26, 1951, to petitioner (R. 479), "Though I began, as you will remember, by disagreeing with the position which you were taking before the Committee, and urging you to abandon it, I have respected it from the outset. Indeed, as I said to you before you went abroad, I am almost convinced that it is a position which people ought to take in similar cases. I think I am the only member of the faculty who feels that way, but one of my colleagues said lately that he understood now better than formerly what you were driving at. Your problem is closely related to the problem of the oath, and eminent and conservative lawyers are among the minority in the American Bar Association who have emphatically opposed the Association's position in advocating a loyalty oath for lawyers. . . ." See Sharp, "The Old Constitution," 20 Univ. Chicago L. Review 529, 541-4 (1953). See, also, R. 319,356, 357; Note 66, this Brief. *Cf.* Cicero, *De Officiis*, Book III, Cap. xxxi (. . . *itaque laus non est hominis, sed temporum.*).

SUPREME COURT OF THE UNITED STATES

No. 58.—October Term, 1960.

In re George Anastaplo, Petitioner. | On Writ of Certiorari to the Supreme Court of Illinois.

[April 24, 1961.]

Mr. Justice Harlan delivered the opinion of the Court.

The questions presented by this case are similar to those involved in No. 28, *Konigsberg* v. *State Bar of California*, decided today. *Ante*, p. —.

In 1954 petitioner, George Anastaplo, an instructor and research assistant at the University of Chicago, having previously passed his Illinois bar examinations, was denied admission to the bar of that State by the Illinois Supreme Court.[1] The denial was based upon his refusal to answer questions of the Committee on Character and Fitness as

[1] The Illinois procedure for admission to the bar was thus summarized by the State Supreme Court (3 Ill. 2d, at 475–476):

"In the exercise of its judicial power over the bar, and in discharge of its responsibility for the choice of personnel who will compose that bar, this court has adopted Rule 58, (Ill. Rev. Stat. 1951, chap. 110, par. 259.58,) which governs admissions and provides, among other things, that applicants shall be admitted to the practice of law by this court after satisfactory examination by the Board of Examiners and certification of approval by a Committee on Character and Fitness. Section IX of the rule provides for the creation of such committees and imposes upon them the duty to examine applicants who appear before them for moral character, general fitness to practice law and good citizenship. Still another condition precedent to admission to practice law in this State, imposed by the legislature, is the taking of an oath to support the constitution of the United States and the constitution of the State of Illinois. (Ill. Rev. Stat. 1951, chap. 13, par. 4.)"

to whether he was a member of the Communist Party. This Court, two Justices dissenting, refused review. 348 U. S. 946. In 1957, following this Court's decisions in the earlier *Konigsberg* case, 353 U. S. 252, and in *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U. S. 232, Anastaplo sought to have the Character Committee rehear his application for certification. The Committee, by a divided vote, refused, but the State Supreme Court reversed and directed rehearing.[3]

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[2] On that occasion the State Supreme Court said (3 Ill. 2d, at 480):

"It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate."

[3] In remanding the matter to the Character Committee, the Illinois Supreme Court stated (see 18 Ill. 2d, at 186):

"'The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California*, 353 U. S. 252, and *Yates* v. *United States*, 1 L. ed. 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.

"'We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions.'"

The ensuing lengthy proceedings before the Committee,[4] at which Anastaplo was the only witness, are perhaps best described as a wide-ranging exchange between the Committee and Anastaplo in which the Committee sought to explore Anastaplo's ability conscientiously to swear support of the Federal and State Constitutions, as required by the Illinois attorneys' oath, and Anastaplo undertook to expound and defend, on historical and ideological premises, his abstract belief in the "right of revolution," and to resist, on grounds of asserted constitutional right and scruple, Committee questions which he deemed improper.[5] The Committee already had before it uncontroverted evidence as to Anastaplo's "good moral character," in the form of written statements or affidavits furnished by persons of standing acquainted with him, and the record on rehearing contains nothing which could properly be considered as reflecting adversely upon his character or reputation or on the sincerity of the beliefs

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[4] The proceedings consumed six hearing days, and resulted in a transcript of over 400 pages.

[5] More particularly: petitioner was first asked routine questions about his personal history. He refused, on constitutional grounds, to answer whether he was affiliated with any church. He answered all questions about organizational relationships so long as he did not know that the organization was "political" in character. He refused, on grounds of protected free speech and association, to answer whether he was a member of the Communist Party or of any other group named in the Attorney General's list of "subversive" organizations, including the Ku Klux Klan and the Silver Shirts of America.

Much of the ensuing five sessions was devoted to discussion of Anastaplo's reasons for believing that inquiries into such matters were constitutionally privileged, and to an unjustifiable attempt, later expressly repudiated by the Committee, to delve into the consistency of petitioner's religious beliefs with an attorney's duty to take an oath of office.

A substantial part of the proceedings revolved around Anastaplo's views as to the right to revolt against tyrannical government, and the right to resist judicial decrees in exceptional circumstances.

he espoused before the Committee.[6] Anastaplo persisted, however, in refusing to answer, among other inquiries, the Committee's questions as to his possible membership in the Communist Party or in other allegedly related organizations.

Thereafter the Committee, by a vote of 11 to 6, again declined to certify Anastaplo because of his refusal to answer such questions, the majority stating in its report to the Illinois Supreme Court:

> "his [Anastaplo's] failure to reply, in our view, (i) obstructs the lawful processes of the Committee, (ii) prevents inquiry into subjects which bear intimately upon the issue of character and fitness, such as loyalty to our basic institutions, belief in representative government and *bona fides* of the attorney's oath and (iii) results in his failure to meet the burden of establishing that he possesses the good moral character and fitness to practice law, which are conditions to the granting of a license to practice law.
>
> "We draw no inference of disloyalty or subversion from applicant's continued refusal to answer questions concerning Communist or other subversive affiliations. We do, however, hold that there is a strong public interest in our being free to question applicants for admission to the bar on their adherence to our basic institutions and form of government and that such public interest in the character of its attorneys overrides an applicant's private interest in keeping such views to himself. By failing to respond to this higher public interest we hold that the appli-

[6] Although the transcript of the prior Committee proceedings has not been made part of the record before us, it is evident that it contained nothing which affirmatively reflected unfavorably on petitioner's character or reputation.

[7] See note 5, *supra*.

> cant has obstructed the proper functions of the Committee . . . . We cannot certify the applicant as worthy of the trust and confidence of the public when we do not know that he is so worthy and when he has prevented us from finding out."

At the same time the full Committee acknowledged that Anastaplo

> "is well regarded by his academic associates, by professors who had taught him in school and by members of the Bar who know him personally . . . ."

that it had

> "not been furnished with any information by any third party which is derogatory to Anastaplo's character or general reputation . . . ."

and that it had

> "received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group."

Further, the majority found that Anastaplo's views

> "with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines."

Upon review, the Illinois Supreme Court, over three dissents,* confirmed the Committee's report and refusal to

* Two dissenting opinions were filed. Justice Bristow dissented on constitutional grounds. 18 Ill. 2d 201. Justices Schaefer and Davis, joining in a single opinion, did not reach the constitutional questions. *Id.*, at 224.

certify Anastaplo, reaffirming in its *per curiam* opinion the court's

> ". . . earlier conclusion that a determination as to whether an applicant can in good conscience take the attorney's oath to support and defend the constitutions of the United States and the State of Illinois is impossible where he refuses to state whether he is a member of a group dedicated to the overthrow of the government of the United States by force and violence." 18 Ill. 2d 182, 200–201.

We granted certiorari, 362 U. S. 968, and set the matter for argument along with the *Konigsberg* case and No. —, *Cohen* v. *Hurley*, *post*, p. —.

Two of the basic issues in this litigation have been settled by our contemporary *Konigsberg* opinion. We have there held it not constitutionally impermissible for a State legislatively, or through court-made regulation as here and in *Konigsberg*, to adopt a rule that an applicant will not be admitted to the practice of law if, and so long as, by refusing to answer material questions, he obstructs a bar examining committee in its proper functions of interrogating and cross-examining him upon his qualifications. That such was a proper function of the Illinois Character Committee is incontestably established by the opinions of the State Supreme Court in this case. 3 Ill. 2d, at 476; 18 Ill. 2d, at 188.[9]

[9] In its second opinion, the State Supreme Court stated (18 Ill. 2d, at 188):

"The Committee further advises us that it has conducted no independent investigation into Anastaplo's character, reputation or activities. For the very practical reason that the committee has no personnel or other resources for any such investigation, the committee states that it has traditionally asserted the view that it cannot be expected to carry the burden of establishing by independent investigation, whether an applicant possesses the requisite character and fitness for admission to the bar and that a duty devolves upon the

We have also held in *Konigsberg* that the State's interest in enforcing such a rule as applied to refusals to answer questions about membership in the Communist Party outweighs any deterrent effect upon freedom of speech and association, and hence that such state action does not offend the Fourteenth Amendment.[10] We think that in this respect no valid constitutional distinction can be based on the circumstance that in *Konigsberg* there was some, though weak, independent evidence that the applicant had once been connected with the Communist Party, while here there was no such evidence as to Anastaplo. Where, as with membership in the bar, the State may withhold a privilege available only to those possessing the requisite qualifications, it is of no constitutional significance whether the State's interrogation of an applicant on matters relevant to these qualifications—in this case Communist Party membership—is prompted by information which it already has about him from other sources, or arises merely from a good faith belief in the need for exploratory or testing questioning of the applicant. Were it otherwise, a bar examining committee such as this, having no resources of its own for independent

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applicant to establish that he possesses the necessary qualifications and that it is then the duty of the committee to test, by hearings and questioning of the applicant, the worth of the evidence which he proffers. We agree, and have held that the discretion exercised by the Committee on Character and Fitness will not ordinarily be reviewed. *In re Frank*, 293 Ill. 263."

[10] The fact that in *Konigsberg* the materiality of questions relating to Communist Party membership rested directly on the existence of a California statute disqualifying from membership in the bar those advocating forcible overthrow of government, whereas here materiality stemmed from their bearing upon the likelihood that a bar applicant would observe as a lawyer the orderly processes that lie at the roots of this country's legal and political systems, cf. *Barenblatt* v. *United States*, 360 U. S. 109, is of course a circumstance of no significance.

investigation, might be placed in the untenable position of having to certify an applicant without assurance as to a significant aspect of his qualifications which the applicant himself is best circumstanced to supply. The Constitution does not so unreasonably fetter the States.[11]

Two issues, however, do arise upon this record which are not disposed of by *Konigsberg*. The first is whether Anastaplo was given adequate warning as to the consequences of his refusal to answer the Committee's questions relating to Communist Party membership. The second is whether his exclusion from the bar on this ground was, in the circumstances of this case, arbitrary or discriminatory.

I.

The opinions below reflect full awareness on the part of the Character Committee and the Illinois Supreme Court of Anastaplo's constitutional right to be warned in advance of the consequences of his refusal to answer.[12] Cf. *Konigsberg* v. *State Bar*, 353 U. S., at 261. On the part of Anastaplo, he stands in the unusual position of one who had already been clearly so warned as a result of his earlier exclusion from the bar for refusal to answer the very question which was again put to him on rehearing.

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[11] Cf. *Garner* v. *Los Angeles Board*, 341 U. S. 716; *American Communications Assn.* v. *Douds*, 339 U. S. 382.

[12] The Committee's majority report states:

"The Committee repeatedly warned the applicant that questions regarding Communist affiliation were viewed as important by the Committee members and that his failure to respond to them could adversely affect his application for admission to the bar."

The Illinois Supreme Court stated (18 Ill. 2d, at 196):

". . . . no problem exists as to inadequate notice of the consequences of a refusal to answer; the applicant was specifically notified both by the Illinois Supreme Court in its opinion in 3 Ill. 2d 471, and by the committee on rehearing that his continued refusal to answer might lead to the denial of his application."

See note 2, *supra*. Anastaplo nevertheless, contends in effect that he was lulled into a false sense of security by various occurrences at the Committee hearings: (1) several statements by Committee members indicating that all questions asked and refused an answer should not be considered as bearing the same level of importance in the eyes of the Committee; [13] and (2) a statement by one of the principal Committee members that Illinois had no "per se" rule of exclusion, that is that Anastaplo's refusal to answer would not *automatically* operate to exclude him from the bar.[14]

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[13] It was stated at one point in the Committee hearings: "It has been pointed out before to you, that the mere fact that a question is asked does not indicate that other people would have asked or approved that question, nor does it indicate that any particular weight will be attached to the answer or failure to answer the question; do you understand." It should be observed, however, that this remark, as was also the case with an earlier similar remark, was made in the context of questions involving petitioner's religious beliefs. See note 3, *supra*.

[14] This aspect of Anastaplo's contention is based on the following episode relating to the Committee's Communist Party questions:

"Mr. Anastaplo: . . . I would like to find out exactly what this entails. You are not suggesting that refusal to answer that question would *per se* block my admission to the bar?

"Commissioner Stephan: No, I am saying your refusal to answer that question as to whether you are a member of the Communist Party, could and might.

"Mr. Anastaplo: I see.

"Commissioner Stephan: To us, it is relevant to your character and fitness. If you should answer the question 'yes,' I am not at all sure that would end the inquiry. I think if you should answer it 'yes,' the committee should be entitled to probe further and find out what kind of Communist Party member the applicant might be, whether he is an active member, whether he is a dues-paying member, whether he is a policy-making member, whether he is an officer in a local group, or just what he is. So I would point out the seriousness of that issue to you at this time.

"Mr. Anastaplo: I assume that the committee does not care to

These suggestions, whether taken separately or together, can only be viewed as insubstantial. The sum and substance of the matter is that throughout the renewed proceedings petitioner was fully aware that his application for admission had already once been rejected on the very ground about which he now professes to have been left in doubt, and that the Committee made manifest both that it continued to attach special importance to its Communist Party affiliation questions, and that adverse consequences might well follow if Anastaplo persisted in refusing to answer them.

What follows will suffice to show that statements to the effect that the Committee as a whole did not necessarily approve or adopt every question asked by any of its members can hardly be taken as having left petitioner in doubt as to the central importance and general approval of questions about Communist Party membership. At an early stage of the proceedings Anastaplo was informed.

> "Now you have asked for a warning when we put a question to you that we think is a pivotal, important question in connection with you qualification. I must tell you that we consider that question, 'Are

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state why this is a particularly serious issue with respect to me? I mean—I notice you say nothing about the Ku Klux Klan or the Silver Shirts of America, about which you have also asked with the same amount of emphasis up to this point, and which I have refused to answer for the same reasons. Would you care to indicate why you say this about this question and not about the other ones?

"Commissioner Stephan: I think there is an easy answer to that. This committee has not come into being—this committee cannot completely ignore the history of this proceeding.

"Commissioner ————: But the history includes that question, and that question has been before two of the high courts of the country.

"Commissioner Stephan: Whatever the relevance of other questions, we consider that one quite relevant."

> you a member of the Communist Party,' such a question; and that the refusal to answer it may have serious consequences to your application."

And at the last hearing one of the leading Committee members responded to Anastaplo's insistence on being told even more explicitly what refusals to answer would be of significance to the Committee, by pointing out that

> "The Supreme Court of Illinois has ruled that it is proper for us to ask you whether you are a member of the Communist Party. You have refused to answer the question." [15]

Further, petitioner's repeated objections throughout the hearings to the effect that there was no basis for the Committee's evident purpose to give much greater emphasis to questions about Communist Party membership than to other unanswered inquiries, dispels any doubt but that Anastaplo was quite aware that Communist-affiliation questions were to be treated differently from other questions he had refused to answer.

The other aspect of petitioner's claim on lack of adequate warning is equally untenable. It is true that the Committee told Anastaplo that his refusal to answer questions would not *ipso facto* result in his exclusion from the bar, but only that it "could and might." This, however, certainly did not give rise to constitutional infirmity. Even as to one charged with crime due process does not demand that he be warned as to what specific sanction will be applied to him if he violates the law. It is enough

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[15] The particular importance which the Committee attached to its Communist Party questions was still further brought home to Anastaplo by the fact that after this Court's decisions in *Beilan* v. *Board of Education*, 357 U. S. 399 and *Lerner* v. *Casey*, 357 U. S. 468 had come down, the Committee wrote Anastaplo specifically drawing his attention to them.

that he know what sanction "could and might" be visited on him. Anastaplo was entitled to no more. It is of course indubitable that by reason of the original rejection of his application, Anastaplo knew of Illinois' rule of exclusion for refusal to answer relevant questions—indeed the very questions involved here.[16]

Petitioner having been fairly warned that exclusion from admission to practice might follow from his refusal to answer, it must be found that this requirement of due process was duly met.

II.

Petitioner's claim that the application of the State's exclusionary rule was arbitrary and discriminatory in the circumstances of this case must also be rejected. It is contended (1) that Anastaplo's refusal to answer these particular questions did not obstruct the Committee's investigation, because that body already had before it uncontroverted evidence establishing petitioner's good character and fitness for the practice of law; and (2) that the real reason why the State proceeded as it did was because of its disapproval of Anastaplo's constitutionally protected views on the right to resist tyrannical government. Neither contention can be accepted.

It is sufficient to say in answer to the first contention that even though the Committee already had before it

[16] We find it difficult to understand how it can be seriously suggested, as it further is, that petitioner was put off guard by the fact that instead of standing on petitioner's mere refusal to answer such questions, the Committee proceeded to interrogate him widely. Not only are subsequent events generally irrelevant to an earlier warning, but a large part of the questioning which Anastaplo now complains led him astray was in fact devoted to exploring the bearing of these questions on his fitness for admission to the bar and his reasons for declining to answer them.

substantial character evidence altogether favorable to Anastaplo, there is nothing in the Federal Constitution which required the Committee to draw the curtain upon its investigation at that point. It had the right to supplement that evidence and to test the applicant's own credibility by interrogating him. And to those ends the Committee could insist upon unprivileged answers to relevant questions, such as we have held in our today's *Konigsberg* opinion those relating to Communist affiliations were, even though as to them the Committee could not, as it did not, draw an unfavorable inference from refusal to answer. *Konigsberg v. State Bar of California, supra.*

As to the second contention, there is nothing in the record which would justify our holding that the State has invoked its exclusionary refusal-to-answer rule as a mask for its disapproval of petitioner's notions on the right to overthrow tyrannical government.[17] While the Committee's majority report does observe that there was "a serious question" whether Anastaplo's views on the right to resist judicial decrees would be compatible with his taking of the attorney's oath, and that "certain" members of the Committee thought that such views affirmatively demonstrated his disqualification for admission to the bar,[18] it is perfectly clear that the Illinois Bar Com-

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[17] Both the Committee's report and the State Supreme Court's opinion make it apparent that this area of Anastaplo's views played no part in his exclusion from the bar. See p. —, *supra*; 18 Ill. 2d, at 188.

[18] This of course could hardly be so in the context of the illustrations which Anastaplo gave of his views as to when a right to resist might arise. These were: Nazi Germany; Hungary during the 1956 revolt against Russia; a hypothetical decree of this Court establishing "some dead pagan religion as the official religion of the country . . . ;" a capital sentence of Jesus Christ. Asked to give a more realistic instance of when resistance would be proper, Anastaplo summarized: "I know of no decree, off hand, in the history

mittee and Supreme Court regarded petitioner's refusal to cooperate in the Committee's examination of him as the basic and only reason for a denial of certification.[19]

A different conclusion is not suggested by the circumstances that the Committee when it reheard Anastaplo evinced its willingness to consider the effect of petitioner's refusal to answer in light of what might transpire at the hearings, and that it continued to explore petitioner's views on resistance and overthrow long after it became clear that he would refuse to answer Communist affiliation questions. These factors indicate no more than that the Committee was attempting to exercise an informed judgment as to whether the situation was an appropriate one for waiver of the Committee's continuing requirement, earlier enforced after the first Anastaplo hearings, that such questions must be answered. Finally, contrary to the assumption on which some of the arguments on behalf of Anastaplo seem to have proceeded, we do not understand that Illinois' exclusionary requirement will continue to operate to exclude Anastaplo from the bar any longer than he continues in his refusal to answer. We find nothing to suggest that he would not be admitted now if he decides to answer, assuming of course that no grounds justifying his exclusion from practice resulted. In short, petitioner holds the key to admission in his own hands.

We conclude with observing that our function here is solely one of constitutional adjudication, not to pass judgment on what has been done as if we were another state

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of American government, where such a single instance has occurred. No—I grant that it is hard to find these instances. I think it is important to insist that there might be such instances." Nothing in the State Court's opinion remotely suggests its approbation of these views of "certain" Committee members.

[19] *Supra*, p. —.

court of review, still less to express any view upon the wisdom of the State's action. With appropriate regard for the limited range of our authority we cannot say that the State's denial of Anastaplo's application for admission to its bar offends the Federal Constitution.[20] The judgment of the Illinois Supreme Court must therefore be

Affirmed.

[20] Apart from anything else, there is of course no room under our Rules for the suggestion made in petitioner's brief that he be admitted to the Bar of this Court, "independently of the action Illinois might be induced to take." See Rule 5, Revised Rules of this Court.

SUPREME COURT OF THE UNITED STATES

No. 58.—October Term, 1960.

In re George Anastaplo, Petitioner. | On Writ of Certiorari to the Supreme Court of Illinois.

[April 24, 1961.]

Mr. Justice Black, with whom The Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan concur, dissenting.

The petitioner George Anastaplo has been denied the right to practice law in the State of Illinois for refusing to answer questions about his views and associations. I think this action by the State violated rights guaranteed to him by the First and Fourteenth Amendments. The reasons which lead me to this conclusion are largely the same as those expressed in my dissenting opinion in *Konigsberg* v. *State Bar of California*, the companion case decided today. But this case provides such a striking illustration of the destruction that can be inflicted upon individual liberty when this Court fails to enforce the First Amendment to the full extent of its express and unequivocal terms that I think it deserves separate treatment.

The controversy began in November 1950,[1] when Anastaplo, a student at the University of Chicago Law School, having two months previously successfully passed the Illinois Bar examination, appeared before the State's Committee on Character and Fitness for the usual inter-

[1] As the majority points out, the record in the first series of hearings, which culminated in a denial of certiorari by this Court (348 U. S. 946), is not a part of the record in this case but we take judicial notice of it. *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 336, and cases cited there.

view preliminary to admission to the Bar. The personal history form required by state law had been filled out and filed with the Committee prior to his appearance and showed that Anastaplo was an unusually worthy applicant for admission. His early life had been spent in a small town in southern Illinois where his parents, who had immigrated to this country from Greece before his birth, still resided. After having received his precollege education in the public schools of his home town, he had discontinued his education, at the age of eighteen, and joined the Air Force during the middle of World War II—flying as a navigator in every major theater of the military operations of that war. Upon receiving an honorable discharge in 1947, he had come to Chicago and resumed his education, obtaining his undergraduate degree at the University of Chicago and entering immediately into the study of law at the University of Chicago Law School. His record throughout his life, both as a student and as a citizen, was unblemished.

The personal history form thus did not contain so much as one statement of *fact* about Anastaplo's past life or conduct that could have, in any way, cast doubt upon his fitness for admission to the Bar. It did, however, contain a statement of *opinion* which, in the minds of some of the members of the Committee at least, did cast such doubt and in that way served to touch off this controversy. This was a statement made by Anastaplo in response to the command of the personal history form: "State what you consider to be the principles underlying (a) the Constitution of the United States." Anastaplo's response to that command was as follows:

> "One principle consists of the doctrine of the separation of powers; thus, among the Executive, Legislative, and Judiciary are distributed various functions and powers in a manner designed to provide for a balance of power, thereby intending to prevent totally

unrestrained action by any one branch of government. Another basic principle (and the most important) is that such government is constituted so as to secure certain inalienable rights, those rights of Life, Liberty and the Pursuit of Happiness (and elements of these rights are explicitly set forth in such parts of the Constitution as the Bill of Rights.). *And, of course, whenever the particular government in power becomes destructive of these ends, it is the right of the people to alter or to abolish it and thereupon to establish a new government.* This is how I view the Constitution." (Emphasis supplied.)

When Anastaplo appeared before a two-man Subcommittee of the Committee on Character and Fitness, one of its members almost immediately engaged him in a discussion relating to the meaning of these italicized words which were substantially taken from that part of the Declaration of Independence set out below.[2] This discussion soon developed into an argument as Anastaplo stood by his statement and insisted that if a government gets bad enough, the people have a "right of revolution." It was at this juncture in the proceedings that the other member of the Subcommittee interrupted with the question: "Are you a member of any organization that is listed on the Attorney General's list, to your knowledge?" And this question was followed up a few

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[2] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

moments later with the question: "Are you a member of the Communist Party?" [3] A colloquy then ensued between Anastaplo and the two members of the Subcommittee as to the legitimacy of the questions being asked,

[3] The following excerpt from the record of the first hearing indicates clearly the connection between Anastaplo's views on the "right of revolution" and the questions subsequently asked him about his "possible" political associations:

"Commissioner MITCHELL: When you say 'believe in revolution,' you don't limit that revolution to an overthrow of a particular political party or a political government by means of an election process or other political means?

"Mr. ANASTAPLO: I mean actual use of force.

"Commissioner MITCHELL: You mean to go as far as necessary?

"Mr. ANASTAPLO: As far as Washington did, for instance.

"Commissioner MITCHELL: So that would it be fair to say that you believe the end result would justify any means that were used?

"Mr. ANASTAPLO: No, the means proportionate to the particular end in sight.

"Commissioner MITCHELL: Well, is there any difference from your answer and my question?

"Mr. ANASTAPLO: Did you ask—

"Commissioner MITCHELL: I asked you whether you thought that you believe that if a change, or overthrow of the government were justified, that any means could be used to accomplish that end.

"Mr. ANASTAPLO: Now, let's say in this positive concrete situation—I am not quite sure what it means in abstract.

"Commissioner MITCHELL: I will ask you in detail. You believe that assuming the government should be overthrown, in your opinion, that you and others of like mind would be justified in raising a company of men with military equipment and proceed to take over the government of the United States, of the State of Illinois?

"By shaking your head do you mean yes?

"Mr. ANASTAPLO: If you get to the point where overthrow is necessary, then overthrow is justified. It just means that you overthrow the government by force.

"Commissioner MITCHELL: And would that also include in your mind justification for putting a spy into the administrative department, one or another of the administrative departments of the United States or the government of the State of Illinois?

[*Footnote 3 continued on p. 5.*]

Anastaplo insisting that these questions were not reasonably related to the Committee's functions and that they violated his rights under the Constitution, and the members of the Subcommittee insisting that the questions were entirely legitimate.

The Subcommittee then refused to certify Anastaplo for admission to the Bar but, instead, set a further hearing on the matter before the full Committee. That next hearing, as well as all of the hearings that followed, have been little more than repetitions of the first. The rift between Anastaplo and the Committee has grown ever wider with each successive hearing. Anastaplo has steadfastly refused to answer any questions put by the Committee which inquired into his political associations or religious beliefs. A majority of the members of the

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"Mr. ANASTAPLO: If you got to the point you think the government should be overthrown, I think that would be a legitimate means.

"Commissioner MITCHELL: There isn't any difference in your mind in the propriety of using a gun or using a spy?

"Mr. ANASTAPLO: I think spies have been used in quite honorable causes.

"Commissioner MITCHELL: Your answer is, you do think so?

"Mr. ANASTAPLO: Yes.

"Commissioner BAKER: Let me ask you a question. Are you aware of the fact that the Department of Justice has a list of what are described as subversive organizations?

"Mr. ANASTAPLO: Yes.

"Commissioner BAKER: Have you ever seen that list?

"Mr. ANASTAPLO: Yes.

"Commissioner BAKER: Are you a member of any organization that is listed on the Attorney General's list, to your knowledge? (No answer.) Just to keep you from having to work so hard mentally on it, what organizations—give me all the organizations you are affiliated with or are a member of. (No answer.) That oughtn't to be too hard.

"Mr. ANASTAPLO: Do you believe that is a legitimate question?

"Commissioner BAKER: Yes, I do. We are inquiring into not only your character, but your fitness, under Rule 58. We don't compel you to answer it. Are you a member of the Communist Party?"

Committee, faced with this refusal, has grown more and more insistent that it has the right to force him to answer any question it sees fit to ask. The result has been a series of hearings in which questions have been put to Anastaplo with regard to his "possible" association with scores of organizations, including the Ku Klux Klan, the Silver Shirts (an allegedly Fascist organization), every organization on the so-called Attorney General's list, the Democratic Party, the Republican Party, and the Communist Party. At one point in the proceedings, at least two of the members of the Committee insisted that he tell the Committee whether he believes in a Supreme Being and one of these members stated that, as far as his vote was concerned, a man's "belief in the Deity . . . has a substantial bearing upon his fitness to practice law."

It is true, as the majority points out, that the Committee did not expressly rest its refusal to certify Anastaplo for admission to the Bar either upon his views on the "right of revolution," as that "right" is defined in the Declaration of Independence, or upon his refusal to disclose his beliefs with regard to the existence of God,[4] or upon his refusals to disclose any of his political associations other than his "possible" association with the Communist Party. But it certainly cannot be denied that the other questions were asked and, since we should not presume that these members of the Committee

[4] As the majority points out, the Committee eventually did expressly disavow any right to insist upon an answer to this question. This came at the end of a long disagreement between Anastaplo and certain members of the Committee with respect to the vitality of an old Illinois decision which indicated that a belief in God might be necessary in order to take an oath to testify. The Committee's abandonment of the point came only after Anastaplo produced a more recent Illinois case disapproving the earlier decision. It is interesting to note that neither of the Committee members who had expressed such a strong interest in knowing whether Anastaplo believes in God voted in favor of his certification.

did not want answers to their questions, it seems certain that Anastaplo's refusal to answer them must have had some influence upon the final outcome of the hearings. In any case, when the Committee did vote, 11–6, not to certify Anastaplo for admission, not one member who asked *any* question Anastaplo had refused to answer voted in his favor.

The reasons for Anastaplo's position have been stated by him time and again—first, to the Committee and, later, in the briefs and oral arguments he presented in his own behalf, both before this Court and before the Supreme Court of Illinois. From a legal standpoint, his position throughout has been that the First Amendment gave him a right not to disclose his political associations or his religious beliefs to the Committee. But his decision to refuse to disclose these associations and beliefs went much deeper than a bare reliance upon what he considered to be his legal rights. The record shows that his refusal to answer the Committee's question stemmed primarily from his belief that he had a duty, both to society and to the legal profession, not to submit to the demands of the Committee because he believed that the questions had been asked solely for the purpose of harassing him because he had expressed agreement with the assertion of the right of revolution against an evil government set out in the Declaration of Independence. His position was perhaps best stated before the Committee in his closing remarks at the final session:

> "It is time now to close. Differences between us remain. I leave to others the sometimes necessary but relatively easy task of praising Athens to Athenians. Besides, you should want no higher praise than what I have said about the contribution the bar can make to republican government. The bar deserves no higher praise until it makes that con-

tribution. You should be grateful that I have not made a complete submission to you, even though I have cooperated as fully as good conscience permits. To the extent I have not submitted, to that extent have I contributed to the solution of one of the most pressing problems that you, as men devoted to character and fitness, must face. This is the problem of selecting the standards and methods the bar must employ if it is to help preserve and nourish that idealism, that vital interest in the problem of justice. that so often lies at the heart of the intelligent and sensitive law student's choice of career. This is an idealism which so many things about the bar, and even about bar admission practices, discourage and make unfashionable to defend or retain. The worthiest men live where the rewards of virtue are greatest.

"I leave with you men of Illinois the suggestion that you do yourselves and the bar the honor, as well as the service, of anticipating what I trust will be the judgment of our most thoughtful judges. I move therefore that you recommend to the Supreme Court of Illinois that I be admitted to the bar of this State. And I suggest that this recommendation be made retroactive to November 10, 1950 when a young Air Force veteran first was so foolish as to continue to serve his country by daring to defend against a committee on character and fitness the teaching of the Declaration of Independence on the right of revolution."

The reasons for the Committee's position are also clear. Its job, throughout these proceedings, has been to determine whether Anastaplo is possessed of the necessary good moral character to justify his admission to the Bar of Illinois. In that regard, the Com-

mittee has been given the benefit of voluminous affidavits from men of standing in their professions and in the community that Anastaplo is possessed of an unusually fine character. Dr. Alexander Meiklejohn, Professor of Philosophy, Emeritus, at the University of Wisconsin, for example, described Anastaplo as "intellectually able, a hard, thorough student and moved by high devotion to the principles of freedom and justice." Professor Malcolm P. Sharp of the University of Chicago Law School stated: "No question has ever been raised about his honesty or his integrity, and his general conduct, characterized by friendliness, quiet independence, industry and courage, is reflected in his reputation." Professor Roscoe T. Steffen of the University of Chicago Law School said: "I know of no one who doubts his honesty and integrity." Yves R. Simon, Professor of Philosophy at the University of Chicago, said: "I consider Anastaplo as a young man of the most distinguished and lofty moral character. Everybody respects him and likes him." Angelo G. Geocaris, a practicing attorney in the City of Chicago, said of Anastaplo: "His personal code of ethics is unexcelled by any practicing attorney I have met in the state of Illinois." Robert J. Coughlan, Division Director of a research project at the University of Chicago, said: "His honesty and integrity are, in my opinion, beyond question. I would highly recommend him without the slightest reservation for any position involving the highest or most sacred trust. The applicant is a rare man among us today; he has an inviolable sense of Honor in the great traditions of Greek culture and thought. If admitted to the American Bar, he could do nothing that would not reflect glory on that institution."

These affidavits and many more like them were presented to the Committee. Most of the statements came from men who knew Anastaplo intimately on the Uni-

versity of Chicago campus where Anastaplo has remained throughout the proceedings here involved, working as a research assistant and as a lecturer in Liberal Arts and studying for an advanced degree in History and Social Sciences. Even at the present time, he is still there preparing his doctoral dissertation which, understandably enough, is tentatively entitled "The Historical and Philosophical Background of the First Amendment of the Constitution of the United States."

The record also shows that the Committee supplemented the information it had obtained about Anastaplo from these affidavits by conducting informal independent investigations into his character and reputation. It sent agents to Anastaplo's home town in southern Illinois and they questioned the people who knew him there. Similar inquiries were made among those who knew him in Chicago. But these intensive investigations apparently [5] failed to produce so much as one man in Chicago or in the whole State of Illinois who could say or would say, directly, indirectly or even by hearsay, one thing derogatory to the character, loyalty or reputation of George Anastaplo, and not one man could be found who would in any way link him with the Communist Party. This fact is particularly significant in view of the evidence in the record that the Committee had become acquainted with a person who apparently had been a member of a Communist Party cell on the University of Chicago campus and that this person was asked to and did identify for the Committee every member of the Party whom he knew.

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[5] The record shows that although Anastaplo repeatedly requested that the Committee allow him to see any reports that resulted from these independent investigations, the Committee, without denying that such reports existed, refused to produce them.

In addition to the information it had obtained from the affidavits and from its independent investigations, the Committee had one more important source of information about Anastaplo's character. It had the opportunity to observe the manner in which he conducted himself during the many hours of hearings before it. That manner, as revealed by the record before us and undenied by any findings of the Committee to the contrary, left absolutely nothing to be desired. Faced with a barrage of sometimes highly provocative and totally irrelevant questions from men openly hostile to his position, Anastaplo invariably responded with all the dignity and restraint attributed to him in the affidavits of his friends. Moreover, it is not amiss to say that he conducted himself in precisely the same manner during the oral argument he presented before this Court.

Thus, it is against the background of a mountain of evidence so favorable to Anastaplo that the word "overwhelming" seems inadequate to describe it that the action of the Committee in refusing to certify Anastaplo as fit for admission to the Bar must be considered. The majority of the Committee rationalized its position on the ground that without answers to some of the questions it had asked, it could not conscientiously perform its duty of determining Anastaplo's character and fitness to be a lawyer. A minority of the Committee described this explanation as "pure sophistry." And it is simply impossible to read this record without agreeing with the minority. For, it is difficult to see what possible relevancy answers to the questions could have had in the minds of these members of the Committee after they had received such completely overwhelming proof beyond a reasonable doubt of Anastaplo's good character and staunch patriotism. I can think of no sound reason for further insistence upon these answers other than the

very questionable, but very human, feeling that this young man should not be permitted to resist the Committee's demands without being compelled to suffer for it in some way.

It is intimated that the Committee's feeling of resentment might be assuaged and that Anastaplo might even be admitted to the Bar if he would only give in to the demands of the Committee and add the requested test oath to the already overwhelming proof he has submitted to establish his good character and patriotism. In this connection, the Court says: "We find nothing to suggest that he would not be admitted now if he decides to answer, assuming of course that no grounds justifying his exclusion from practice resulted. In short, petitioner holds the key to admission in his own hands." However well this familiar phrase may fit other cases, it does not fit this one. For the attitude of the Committee, as revealed by the transcript of its hearings, does not support a belief that Anastaplo can gain admission to the Illinois Bar merely by answering the Committee's questions, whatever answers he should give. Indeed, the Committee's own majority report discloses that Anastaplo's belief in the "right of revolution" was regarded as raising "a serious question" in the minds of a majority of the Committee with regard to his fitness to practice law and that "certain" members of that majority (how many, we cannot know) have already stated categorically that they will not vote to admit an applicant who expresses such views. Nor does the opinion of the Illinois Supreme Court indicate that Anastaplo "holds the key to admission in his own hands." Quite the contrary; that court's opinion evidences an almost insuperable reluctance to upset the findings of the Committee. Certainly, that opinion contains nothing that even vaguely resembles the sort of implicit promise that would justify the belief asserted by the majority here. And, finally, I see nothing in the

majority opinion of this Court, nor in the majority opinions in the companion cases decided today, that would justify a belief that this Court would unlock the door that blocks his admission to the Illinois Bar if Anastaplo produced the "key" and the state authorities refused to use it.

The opinion of the majority already recognizes that there is not one scrap of evidence in the record before us "which could properly be considered as reflecting adversely upon his [Anastaplo's] character or reputation or on the sincerity of the beliefs he espoused before the Committee," and that the Committee had not received " 'any information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group.' " The majority opinion even concedes that Anastaplo was correct in urging that the questions asked by the Committee impinged upon the freedoms of speech and association guaranteed by the First and Fourteenth Amendments. But, the opinion then goes on to hold that Anastaplo can nonetheless be excluded from the Bar pursuant to "the State's interest in having lawyers who are devoted to the law in its broadest sense. . . ." [6] I cannot regard that holding, as applied to a man like Anastaplo, as in any way justified. Consider it, for example, in the context of the following remarks of Anastaplo to the Committee—remarks the sincerity of which the majority does not deny:

> "I speak of a need to remind the bar of its traditions and to keep alive the spirit of dignified but determined advocacy and opposition. This is not only for the good of the bar, of course, but also because of what the bar means to American republican government.

[6] *Konigsberg* v. *State Bar of California*, decided today, *ante*, p. —, —, which the majority here relies upon as also having settled the issue in this case.

> The bar when it exercises self-control is in a peculiar position to mediate between popular passions and informed and principled men, thereby upholding republican government. Unless there is this mediation, intelligent and responsible government is unlikely. The bar, furthermore, is in a peculiar position to apply to our daily lives the constitutional principles which nourish for this country its inner life. Unless there is this nourishment, a just and humane people is impossible. The bar is, in short, in a position to train and lead by precept and example the American people."[5]

These are not the words of a man who lacks devotion to "the law in its broadest sense."

The majority, apparently considering this fact irrelevant because the State might *possibly* have an interest in learning more about its Bar applicants, decides that Anastaplo can properly be denied admission to the Bar by purporting to "balance" the interest of the State of Illinois in "having lawyers who are devoted to the law in the broadest sense" against the interest of Anastaplo and the public in protecting the freedoms of the First Amendment, concluding, as it usually does when it engages in this process, that "on balance" the interest of Illinois must prevail.[6] If I had ever doubted that

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[5] These remarks were made by Anastaplo in his closing argument before the Committee. He also introduced evidence to the Committee that he had earlier expressed similar views in a book review published in 1954. See Anastaplo, Review: Drinker, Legal Ethics, 14 Law. Guild Rev. 144.

[6] I think the majority has once again misapplied its own "balancing test," for the interests it purports to "balance" are no more at stake here than in *Konigsberg*. Moreover, it seems clear to me that Illinois, like California, is placing the burden of proof upon applicants for the Bar to prove they do not advocate the overthrow of the government. Thus the decision here, like that in *Konigsberg*, is contrary to *Speiser* v. *Randall*, 357 U. S. 513.

the "balancing test" comes close to being a doctrine of governmental absolutism—that to "balance" an interest in individual liberty means almost inevitably to destroy that liberty—those doubts would have been dissipated by this case. For this so-called "balancing test"—which, as applied to the First Amendment, means that the freedoms of speech, press, assembly, religion and petition can be repressed whenever there is a sufficient governmental interest in doing so—here proves pitifully and pathetically inadequate to cope with an invasion of individual liberty so plainly unjustified that even the majority apparently feels compelled expressly to disclaim "any view upon the wisdom of the State's action."

I, of course, wholeheartedly agree with the statement of the majority that this Court should not, merely on the ground that such action is unwise, interfere with governmental action that is within the constitutional powers of that government. But I am no less certain that this Court should not permit governmental action that plainly abridges constitutionally protected rights of the People merely because a majority believes that on "balance" it is better, or "wiser," to abridge those rights than to leave them free. The inherent vice of the "balancing test" is that it purports to do just that. In the context of its reliance upon the "balancing test," the Court's disclaimer of "any view upon the wisdom of the State's action" here thus seems to me to be wholly inconsistent with the only ground upon which it has decided this case.

Nor can the majority escape from this inconsistency on the ground that the "balancing test" deals only with the question of the importance of the existence of governmental power as a general matter without regard to the importance of its exercise in a particular case. For in *Barenblatt* v. *United States* the same majority made it clear that the "balancing test" is to be applied to the facts of each particular case: "Where First Amendment rights

are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake *in the particular circumstances shown.*" [9] (Emphasis supplied.) Thus the Court not only "balances" the respective values of two competing policies as a general matter, but also "balances" the wisdom of those policies in "the particular circumstances shown." Thus, the Court has reserved to itself the power to permit or deny abridgment of First Amendment freedoms according to its own view of whether repression or freedom is the wiser governmental policy under the circumstances of each case.

The effect of the Court's "balancing" here is that any State may now reject an applicant for admission to the Bar if he believes in the Declaration of Independence as strongly as Anastaplo and if he is willing to sacrifice his career and his means of livelihood in defense of the freedoms of the First Amendment. But the men who founded this country and wrote our Bill of Rights were strangers neither to a belief in the "right of revolution" nor to the urgency of the need to be free from the control of government with regard to political beliefs and associations. Thomas Jefferson was not disclaiming a belief in the "right of revolution" when he wrote the Declaration of Independence. And Patrick Henry was certainly not disclaiming such a belief when he declared in impassioned words that have come on down through the years: "Give me liberty or give me death." This country's freedom was won by men who, whether they believed in it or not, certainly practiced revolution in the Revolutionary War.

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[9] 360 U. S. 109, 126. The majority in *Barenblatt* then proceeded to "balance" those interests on the basis of the particular record of that case. *Id.*, at 127–134.

Since the beginning of history there have been governments that have engaged in practices against the people so bad, so cruel, so unjust and so destructive of the individual dignity of men and women that the "right of revolution" was all the people had left to free themselves. As simple illustrations, one government almost 2,000 years ago burned Christians upon fiery crosses and another government, during this very century, burned Jews in crematories. I venture the suggestion that there are countless multitudes in this country, and all over the world, who would join Anastaplo's belief in the right of the people to resist by force tyrannical governments like those.

In saying what I have, it is to be borne in mind that Anastaplo has not indicated, even remotely, a belief that this country is an oppressive one in which the "right of revolution" should be exercised.[10] Quite the contrary, the entire course of his life, as disclosed by the record, has been one of devotion and service to his country—first, in his willingness to defend its security at the risk of his own life in time of war and, later, in his willingness to defend its freedoms at the risk of his professional career in time of peace. The one and only time in which he has come into conflict with the Government is when he refused to answer the questions put to him by the Committee about

[10] Anastaplo's belief in the "right of revolution," as disclosed in this record, is no different from that expressed by Professor Chafee: "Most of us believe that our Constitution makes it possible to change all bad laws through political action. We ought to disagree vehemently with those who urge violent methods, and whenever necessary take energetic steps to prevent them from putting such methods into execution. This is a very different matter from holding that all discussion of the desirability of resorting to violence for political purposes should be ruthlessly stamped out. There is not one among us who would not join a revolution if the reason for it be made strong enough." Chafee, Free Speech in the United States 178 (Harvard University Press, 1942).

his beliefs and associations. And I think the record clearly shows that conflict resulted, not from any fear on Anastaplo's part to divulge his own political activities, but from a sincere, and in my judgment correct, conviction that the preservation of this country's freedom depends upon adherence to our Bill of Rights. The very most that can fairly be said against Anastaplo's position in this entire matter is that he took too much of the responsibility of preserving that freedom upon himself.

This case illustrates to me the serious consequences to the Bar itself of not affording the full protections of the First Amendment to its applicants for admission. For this record shows that Anastaplo has many of the qualities that are needed in the American Bar.[11] It shows, not only that Anastaplo has followed a high moral, ethical and patriotic course in all of the activities of his life, but also that he combines these more common virtues with the uncommon virtue of courage to stand by his principles at any cost. It is such men as these who have most greatly honored the profession of the law—men like Malsherbes, who, at the cost of his own life and the lives of his family, sprang unafraid to the defense of Louis XVI against the fanatical leaders of the Revolutionary government of France[12]—men like Charles Evans Hughes, Sr., later Mr.

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[11] For a similar case, see *In re Summers*, 325 U. S. 561, in which a 5–4 majority of this Court upheld an informal order of the Illinois Supreme Court denying Bar admission to Clyde W. Summers on the ground that his religious beliefs were inconsistent with the Illinois Constitution.

[12] At the time of his decision to volunteer his services in defense of Louis XVI, Malsherbes, a man of more than seventy, was apparently completely safe from the post-revolutionary blood bath which then enveloped France. For, although active in public life prior to the Revolution, he had always been a friend of the people and, in any case, he had largely passed out of the public mind with his retirement some years earlier. Within a year of his unsuccessful defense of the

Chief Justice Hughes, who stood up for the constitutional rights of socialists to be socialists and public officials despite the threats and clamorous protests of self-proclaimed super patriots [13]—men like Charles Evans Hughes, Jr., and John W. Davis, who, while against everything for which the Communists stood, strongly advised the Congress in 1948 that it would be unconstitutional to pass the law then proposed to outlaw the Communist Party [14]—men like Lord Erskine, James Otis, Clarence Darrow, and the multitudes of others who have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it.

But that is the present trend, not only in the legal profession but in almost every walk of life. Too many men are being driven to become government-fearing and time-serving because the government is being permitted to strike out at those who are fearless enough to think as they

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life of France's former king, however, he, together with his entire family, were convicted by a revolutionary tribunal on the vague charge of conspiracy against "the safety of the State and the unity of the Republic." Malsherbes was then taken to the guillotine where, after being forced to witness the beheading of the other members of his family, he paid with his life for his courage as a lawyer. This story has been interestingly told by John W. Davis. See Davis, The Lawyers of Louis XVI, in The Lawyer, April 1942, p. 5, at 6–13.

[13] The story of Hughes' participation in the fight against the action of the New York Legislature in suspending five of its members in 1920 on the ground that they were socialists is told in John Lord O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592, 593–594.

[14] See *Barenblatt* v. *United States*, 360 U. S. 109, 147–148 (dissenting opinion).

please and say what they think.[15] This trend must be halted if we are to keep faith with the Founders of our Nation and pass on to future generations of Americans the great heritage of freedom which they sacrificed so much to leave to us. The choice is clear to me. If we are to pass on that great heritage of freedom, we must return to the original language of the Bill of Rights. We must not be afraid to be free.

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[15] See, *e. g.*, *Barsky* v. *Board of Regents*, 347 U. S. 442; *Uphaus* v. *Wyman*, 360 U. S. 72; *Barenblatt* v. *United States*, 360 U. S. 109; *Uphaus* v. *Wyman*, 364 U. S. 388; *Wilkinson* v. *United States*, 365 U. S. 399; *Braden* v. *United States*, 365 U. S. 431; *Konigsberg* v. *State Bar of California*, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 58.—October Term, 1960.

In re George Anastaplo, Petitioner. | On Writ of Certiorari to the Supreme Court of Illinois.

[April 24, 1961.]

Mr. Justice Brennan, with whom The Chief Justice joins, dissenting.

I join Mr. Justice Black's dissent. I add only that I think the judgment must also be reversed on the authority of *Speiser* v. *Randall*, 357 U. S. 513, for the reasons expressed in my dissent in *Konigsberg* v. *State Bar of California*.